Supreme Court, U.S.
FILED

011869 JUN 20 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

BUCKINGHAM TOWNSHIP,

Petitioner,

v.

KEN WYKLE, HONORABLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; DELAWARE VALLEY REGIONAL PLANNING COMMISSION; and BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT R. ELLIOTT
Counsel of Record
ROBERT J. SUGARMAN
3521 Prospect NW
Suite 500
Washington, D.C. 20007
(202) 338-5835
Attorneys for Petitioner

174569

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

77pgs

QUESTIONS PRESENTED FOR REVIEW

1. Should judicial review of administrative action be so deferential as to authorize conscious manipulation of the record, in order to avoid rules requiring disclosure of the effects of the action, and to violate the mandate to discuss alternatives to the action, where the governing statute (the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*) requires disclosure and discussion, pursuant to decisions of this Court?

2. Where judicial deference to administrative good faith action is required, and objective and subjective good faith are placed at issue by the disclosure of evidentiary manipulation, does the rule that review is focused on the information before the agency properly apply to preclude evidentiary hearings?

3. Does the Eleventh Amendment allow states which intervene in federal cases to bar review of their compliance with state law?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	3
How the Federal Question Was Presented	3
Statement of Facts	3
Reasons for Granting the Writ	7
I. Summary Of Argument	7
II. Substantial Compliance With NEPA's Disclosure Requirements Should Be Required	10
III. A Rule Is Needed As To When Evidence Is Allowed To Determine The Significance And Good Faith Of Omissions From The Record	15
IV. The Effect Of The Present Third Circuit Rule Is Significantly Adverse	23

Contents

Page

V. Eleventh Amendment Immunity Should Not Apply, After *Lapides*, To A State That Intervenes 25

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

Airport Impact Relief, Inc. v. Wykle,
192 F.3d 197 (1st Cir. 1999) 17

Baltimore Gas & Elec. Co. v. Natural Resources Defense Council,
462 U.S. 87 (1983) 7, 10

Buckingham Township v. Wykle, et al.,
157 F. Supp. 2d 457 (E.D. Pa. 2001) 1, 13

Buckingham Township v. Wykle, et al.,
2002 WL 21710 (3d Cir. 2002) 1

Camp v. Pitts,
411 U.S. 138 (1973) 9, 15, 16, 17, 19, 21

Carmel-By-The-Sea v. U.S. Dept. of Transp.,
123 F.3d 1142 (9th Cir. 1997) 10

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 8, 15, 16, 18, 19

City of Bridgeton v. FAA,
212 F.3d 448 (8th Cir. 2000), *cert. denied*,
531 U.S. 1111 (2001) 10

County of Suffolk v. Secretary of Interior,
562 F.2d 1368 (2d Cir. 1977), *cert. denied*,
434 U.S. 1064 (1978) 17, 18

Cited Authorities

Page

Cronin v. United States Department of Agriculture,
919 F.2d 439 (7th Cir. 1990) 17

Dickinson v. Zurko,
527 U.S. 150 (1999) 20

Druid Hills Civic Association, Inc. v. Federal Highway Administration,
772 F.2d 700 (11th Cir. 1985), *cert. denied*,
488 U.S. 819 (1988) 10-11

Dubois v. U.S. Dept. of Agriculture,
102 F.3d 1273 (1st Cir. 1996), *cert denied*,
521 U.S. 1119 (1997) 10

Ex Parte Young,
209 U.S. 123 (1908) 26

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985) 7, 9, 16, 17, 19, 20

Hickory Neighborhood Defense League v. Skinner,
893 F.2d 58 (4th Cir. 1990) 10

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 7, 10, 20, 22

Lapides v. Board of Regents of University System of Georgia,
535 U.S. __, 122 S. Ct. 1640 (2002) 25, 26

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 20, 22

Cited Authorities

Page

National Audubon Society v. Hoffman,
132 F.3d 7 (2d Cir. 1997) 17

National Audubon Society v. U.S. Forest Service,
46 F.3d 1437 (9th Cir. 1994) 17

NRDC v. Hodel,
865 F.2d 288 (D.C. Cir. 1988) 10

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.,
461 U.S. 190 (1983) 20

Sierra Club v. Corps. of Engineers,
701 F.2d 1011 (2d Cir. 1983) 16

Sierra Club v. Corps. of Engineers,
772 F.2d 1043 (2d Cir. 1985) 16

Sierra Club v. Marsh,
976 F.2d 763 (1st Cir. 1992) 17

Township of Springfield v. Lewis,
702 F.2d 426 (3d Cir. 1983) 11

Trinity Episcopal School Corp. v. Romney,
523 F.2d 88 (2d Cir. 1975) 11

Verizon Maryland, Inc. v. Public Service Commission of Maryland,
122 S. Ct. 1753 (2002) 25

Cited Authorities

Page

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978) 10

Webb v. Gorsuch, 699 F.2d 157 (4th Cir. 1983) 17

Statutes:

National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ..... i, 3, 11

Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* 2, 3

28 U.S.C. § 1331 3

28 U.S.C. § 1367 3

Federal Regulation:

40 C.F.R. § 1502.14 11

TABLE OF APPENDICES

Page

Appendix A — Memorandum Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed January 7, 2002 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The Eastern District Of Pennsylvania Dated June 21, 2001 And Entered And Filed June 22, 2001 ..... 5a

Appendix C — Order Of The United States District Court For The Eastern District Of Pennsylvania Filed February 25, 2000 And Entered February 28, 2000 ..... 36a

Appendix D — Opinion Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated March 22, 2002 ..... 40a

Petitioner, Buckingham Township, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals in *Buckingham Township v. Wykle, et al.*, No. 01-2673 (3d Cir. 2002) is not published, but can be found at 2002 WL 21710. (Appendix A). The opinion of the district court is reported at *Buckingham Township v. Wykle, et al.*, 157 F. Supp.2d 457 (E.D.Pa. 2001). (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 30, 2001. (Appendix A). The Court of Appeals denied a timely petition for rehearing on March 22, 2002. (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4332(2)(C) of the National Environmental Policy Act (NEPA) provides, in relevant part, as follows:

> [A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided

> should the proposal be implemented; (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

Section 4332(2)(E) of the National Environmental Policy Act (NEPA) provides, in relevant part, as follows:

> [A]ll agencies of the Federal Government shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

42 U.S.C. § 4332(2)(E).

Section 706 of the Administrative Procedures Act provides, in relevant part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .

5 U.S.C. § 706.

STATEMENT OF THE CASE

This highway-sprawl case demonstrates the necessity for this Court to resolve whether the command of the National Environmental Policy Act to fully explicate the environmental impacts of, and alternatives to, major federal actions, is truly enforceable because it illustrates the widespread confusion as to how judicial review can effectively review a project agency presentation. The law is in disarray. This case presents a glaring instance where non-record information was not explicated, and information unfavorable to the agencies' intentions was suppressed and excluded; and judicial review was conducted without the benefit of any evidentiary opportunity to demonstrate the illegality of the Agency action, due to the lower courts' belief that evidence is not permitted, even if it is the only way to obtain reasonable disclosure and determine good faith where critical information was brought to the surface and/or created after the agency action was taken. In this specific case, this conduct led to the approval of the impact statement and construction of a $300,000,000 highway project by the Federal Highway Administration ("FHWA") without consideration by the agency of the effects on the community, petitioner, Buckingham Township, Bucks County, Pennsylvania.

How the Federal Question Was Presented

Jurisdiction was invoked under 28 U.S.C. § 1331 to secure review under Section 706 of the Administrative Procedures Act, 5 U.S.C. § 706, of action under NEPA, 42 U.S.C. § 4332. In addition, a request to add supplementary state issues by amendment under 28 U.S.C. § 1367 was made when the State moved to intervene.

Statement of Facts

Route U.S. 202 is a historic two lane highway between Wilmington, Delaware and Portland, Maine. It runs through Buckingham. Historic Bucks County is an original William Penn

county. Although the Township has experienced massive development over the last decade, a portion retains the historic character of 18th century English farm country, and as such, is an internationally known tourist destination.

Route 202 runs through Buckingham Township as a two lane road. Just south of Buckingham, FHWA proposes a new nine mile four lane segment of a 202 expressway (Section 700) terminating (with a connector) .5 mile short of the Buckingham line. In 1996, FHWA released a draft environmental impact statement ("DEIS") (primarily drafted by PennDot) regarding Section 700, purporting to describe the environmental impacts and alternatives of the proposed expressway. Buckingham was intentionally excluded from the DEIS because "we don't want the opponents involved." (Minutes of 12/6/90 Meeting, App 004088a to 95a).[1] Alternatives which would avoid the effects on Buckingham were also excluded. Buckingham Township had also been excluded from the committee of local public officials, which had monitored the progress of the EIS.

When Buckingham learned of the project scope from reading the DEIS, Buckingham protested and submitted voluminous documentation supporting Buckingham's belief that the highway would have a significant adverse effect on Buckingham. (Buckingham 10/96 comments to DEIS, App 2-000918a to 2-000932a). The exclusion had been questioned by the Corps of Engineers, the Bucks County Planning Commission, the Environmental Protection Agency, and other agencies. (App 004148a to 50a). In response, respondents stated they had prepared a traffic study which they stated, in the FEIS, showed that Buckingham would not be significantly affected. Concurrently they conceived and designed a transitional intersection and lane expansion extending into Buckingham. (App 004206a). They did not deny that major traffic congestion would have significant environmental, adverse effects, nor could

1. Citations to "App" refer to the Appendix filed in the Third Circuit.

they, since they had themselves stressed such effects in the communities where they asserted the road would alleviate such effects. (FEIS, App 2-000453a to 2-000454a).

In finalizing the EIS, Respondent FHWA (1) decided to call the new intersection an "independent project" (FEIS, App 2-000548a), which was false (thus avoiding a modified EIS process); (2) decided to continue to exclude the environmental effects of the project on Buckingham, on the ground "the roads in Buckingham can handle the traffic." (FEIS, App 2-000523a). Only after the FEIS was released did they provide copies of the report on the traffic study to Buckingham. The report characterized the "study" as a computer "focused" application of a regional program. (App 2-003834a to 3837a).

Despite the NEPA requirement to address all practical alternatives in the EIS, FHWA omitted from the alternatives discussion an alternative had been preferred but that halfway through the EIS process, had been deleted. The project was converted from a "controlled arterial" (a four lane boulevard with traffic lights) into an expressway. (FEIS, App 2-000195a to 2-000196a). Instead, the name "new alignment alternative" had been appropriated from the arterial to the expressway and the controlled arterial had not been presented as an alternative. Since the model was responsive to speed, the impact of this conversion was to nearly double the predicted traffic on the proposed road (the amount of which was not discussed in the FEIS, App 3-000342a to 3-000349a), and therefore create increases at the terminus in Buckingham. Thus, the initial agency concurrences had been based on a lower volume, whereas the higher volume was not presented, and the alternative with the lower volume was excluded from the DEIS and FEIS.

After the record was closed, and this suit was pending, the District Court ordered that the computer disks of the alleged focused study be produced. The traffic engineer responsible for

the study then sua sponte produced an affidavit admitting that virtually all the output numbers had been changed by him, (Declaration of Thabet Zakaria, App 004481a), and therefore did not represent a computer study. Analysis of the disk program and data showed that massive changes had been made in the input data and fictitious assumptions (set ups) had been used to attempt to produce the desired result, thus further contradicting the claim of a proper study. (*See e.g.*, Affidavit of Anthony Tomazinis, App 004529a to 35a).

After this was documented to the District Court in expert affidavits and computer printouts, the agency then conducted new studies and purported to show through these new studies that the ultimate outcome would not be affected significantly. However, the agency never disclosed the data or assumptions underlying the results; only its interpretation. FHWA also asserted it had conducted an independent study after the FEIS, and the District Court relied on this, although it was only an intersection analysis which assumed the lowered traffic volumes in the discredited study.

In these circumstances, the Township filed several Motions for Preliminary Injunction and for hearing, which the District Court held until it granted summary judgment.

Despite being confronted with all these proofs, the District Court granted summary judgment to the defendants. It refused Buckingham's requests to conduct an evidentiary hearing to determine the effects on Buckingham and/or the good faith of the agencies and the engineers in presenting the deceptive and false information, and in hiding the arterial alternative and other alternatives that would have been material if Buckingham had been included in the study area scope. Instead, the District Court, approving the project (Appendix B at 23, 25, 32-33), excoriated Buckingham for seeking to block development (p.1), and being "rancorous" (Appendix B at 32), while it commended the agency

for having presented a stellar study, reiterating the fact that the EIS language had reflected the language requirements of NEPA. In essence, the District Court opinion found that the agency had filled in the proper boxes, and that since the project was inevitable, in its view, failures of proper disclosure could be ignored. The District Court justified its action in approving the end result by stating that development is necessary, highways are necessary to development, and it criticized Buckingham's attitude. (Appendix B at 1, 32-22).

On appeal, the Circuit Court held that the agency could have been more "forthcoming" and urged it to do so in the future. (Appendix A at 3). The Court acknowledged the serious nature of the issues raised by Buckingham, but did not deal with them. However, it endorsed the opinion of the District Court. The Third Circuit did not explicitly address the issue of an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

This Court's action is required because:

1. This Court has stressed that NEPA was designed to insure quality environmental decision making, precisely by emphasizing and mandating the full explication, disclosure, and analysis of environmental consequences of proposed projects, and the comparative consequences of the alternatives. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 89-90 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). Indeed, this Court has stressed that NEPA is essentially a procedural means to accomplish that result: the statute depends in its entirety on the full explication, and on robust exposure of the facts. *See Kleppe*, 427 U.S. at 409.

Consistent with this Court's mandate, many of the Courts of Appeal have emphasized the critical need for full explication. In complete contrast, the instant case turns its back on complete explication, and focuses on the Court's view that since development is necessary, agencies should be allowed to proceed with only paper or nominal compliance. In short, the lower courts' decisions in this case defeat this Court's mandate, inconsistently with the decisions in most circuits. By maintaining this inconsistency, the decision of the lower courts herein permit the substantive defeat of this Court's holdings.

This Court has not previously had occasion to visit the issue of the means to insure that the role that this Court defined for NEPA is in fact achieved. Unless this case is reversed, it will maintain a lower court policy in a few circuits to implicitly consider whether the project is "good", "necessary", or "reasonable"; and if the Court feels it is such, then to excuse compliance with NEPA.

2. The case represents an example of a split in the circuits on the question whether or to what extent evidentiary hearings are appropriate to review non-record administrative decisions by project agencies. In this regard, several circuits permit evidentiary hearings to supplement the record made by the agency, in situations where the agency has a self-determined record, no formal hearings, and no testimony, because there may be issues as to the agencies preventing innocently or otherwise, necessary information to be of record. The Third Circuit does not do so.

This Court's decision in *Overton Park v. Volpe*, 401 U.S. 402 (1971), contained language which has led to a misinterpretation of the intent of this Court. The Court in *Overton* stated that the ultimate question in reviewing an agency decision was to focus on whether the secretary's decision was reasonable in light of the information available to him.

This naturally led to focus on what was before the secretary, as the subject matter to be evaluated. However, in later cases, *Camp v. Pitts*, 411 U.S. 138 (1973), and *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), the language was interpreted to mean that the evidence should be so limited.

This creates a tremendous gap between what was before the secretary on the one hand, and what is in the record on the other hand. Because significant material may be excluded from the record does not mean it was not before the secretary. Understanding the term "secretary" to be a figure of expression for the agency decision makers, in particular, information that was covered up, misstated, or simply excluded from the record, becomes insulated from reviewing what was before the secretary, by its exclusion from the record. Despite this, some courts, and particularly the Third Circuit, have adopted a narrow, rigid rule essentially prohibiting testimony, even where the testimony is offered for the purpose of showing that additional information before the secretary, *i.e.* suppressed knowledge or misstatements, contradicted both what was in the record and what was in the rationale for the decision.

In the context where significant agency actions have tremendous impact on the future of the nation's growth and environment, it is essential that this confusion and conflict be addressed and that this Court make it clear that focusing on what was before the agency does not mean excluding evidence contradicting what the agency chooses to put in the record.

If the law is allowed to remain as it is, NEPA cannct be given the force of law, and administrative agencies are authorized to water down and impose their own project centered policy, despite the mandate of NEPA.

II. SUBSTANTIAL COMPLIANCE WITH NEPA'S DISCLOSURE REQUIREMENTS SHOULD BE REQUIRED

The NEPA area is one in which disclosure in the administrative record is itself a congressional mandate, since NEPA as determined by this Court, is essentially a disclosure statute. *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 558 (1978). NEPA's mandate to agencies is "essentially procedural." *Id.* In these circumstances, the statutory standard of decision making is applicable to the disclosure decision itself. This is not merely a technical requirement; it is the essence of the statute that it requires the agency to explicate all of the facts and make a good faith decision based on the full explication, as this Court has repeatedly stated. *See Baltimore Gas*, 462 U.S. at 98; *Kleppe*, 427 U.S. at 402, 410.

In the circumstances, where disclosure, explication, is the essential mandate of the statute itself, compliance with that mandate is essential, as this Court has stated. *See Vermont Yankee*, 435 U.S. at 558. Accordingly, as this Court has enforced this statute, many courts have recognized the importance of implementing the requirement to, therefore, require that the information be disclosed, and not be shoved under the rug.

Various other circuits have implemented this mandate differently, as a result of which there is a serious conflict among the circuits. Most circuits have expressed reinforcements to a strict interpretation of the statute, e.g., *City of Bridgeton v. FAA*, 212 F.3d 448 (8th Cir. 2000), *cert. denied*, 531 U.S. 1111 (2001); *Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142 (9th Cir. 1997); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58 (4th Cir. 1990); *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); *Druid*

Hills Civic Association, Inc. v. Federal Highway Administration, 772 F.2d 700 (11th Cir. 1985); *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975).

The Third Circuit, however, has taken a more relaxed approach, in which it has allowed inadequate action by the agency to occur, where the Court concludes that the project result (not the NEPA compliance result) is acceptable. This case is an example of that relaxed approach. The District Court, in failing to address the shortcomings of the EIS, offset any concerns by referring to the need for the project, and denigrating the concern of the Township for protection of its environmental quality, and criticizing its opposition as "rancorous". (Appendix B at 32). The Circuit Court more forthcomingly recognized the defects, but endorsed the District Court's opinion.

Similarly, in other cases, such as *Township of Springfield v. Lewis*, 702 F.2d 426, 442 (3d Cir. 1983), the Third Circuit has openly acknowledged that there was a failure to comply with NEPA in failing to properly address an alternative, but, based on litigation affidavits which it allowed to be considered, submitted by the agency, it allowed the agency to rectify the noncompliance in the Court.

The Third Circuit rule clearly allows agency non-compliance with this mandate; it denigrates the statute and the mandate of this Court; it allows the agency to evade compliance by failing to place into the record information which it possesses or is in its control, thereby frustrating the purpose of Congress and the language of the statute as interpreted by this Court. The statute states that the agency *shall* issue an environmental impact statement, shall study the consequences, and shall study the alternatives, and publish an impact statement, and allow comment thereon. 42 U.S.C. § 4332(2)(C); *See also* CEQ Regulations, 40 C.F.R. § 1502.14 (consideration of alternatives "is the heart of the environmental impact statement").

As alluded to in the statement of the case, and must be emphasized, this is *not* a case where there are dispositive fact findings, however erroneous, against the Township. The District Court, after having the case on renewed cross motions for summary judgment for a year, made no findings of fact. Rather, the District Court repeated the conclusory allegations of the defendants' EIS and Summary Judgment Brief, which touched the bases, e.g., defendants properly studied the alternatives. The Third Circuit characterized the issues as serious, and the agencies as non-forthcoming. The facts critical to the issues here, non-disclosure and mischaracterization cannot be seriously contested. It is uncontested, for example, that agencies determined not to study the effects on the petitioner township, and at the time, stated that the reason was they did not want to, involved petitioner's opposition. (Minutes of 12/6/90 Meeting, App 004088a to 95a). It is uncontested that the defendants converted the previously preferred alternative controlled arterial, with a twenty year projected volume of 35,000 vehicles to an expressway, nearly doubling the volume, but borrowed the same term "new alignment alternative" for both alternatives, never comparing the two in the EIS or even identifying the controlled arterial alternative in the alternatives comparison. (FEIS, App 2-000195a to 2-000196a). It is uncontested that defendants, when confronted with further demand for consideration of the effects of the roadway on the excluded area in 1996 by the Township and the other federal agencies, prepared a traffic study, which was falsely described as the outcome of a study conducted pursuant to normal computer analysis procedures and generally utilized data, all of which was false, and incorporated that into the EIS, after suppressing an earlier version which did not suit them, using inconsistent explanations. (App. 003812a). It is uncontested that after the litigation was instituted, and the District Court ordered the release of the underlying data and assumptions, and then reordered it in the disk format, defendants' traffic agency then, for the first time, filed an affidavit disclosing that they had adjusted virtually every outfit of the study (later argued that only two-thirds were adjusted by less than fifteen

percent), misleadingly omitting that most of the other third was adjusted by more than fifteen percent, at oral argument in the District Court. (Declaration of Thabet Zakaria, App 00481a; Tr. App 006378a to 006379a). Nor is it contested that defendants, when confronted with the fact that they had utilized fictional highways and highway lanes which diverted projected traffic from 202, *i.e.*, segments, which reduced the volume which they asserted would occur in Buckingham Township, then conducted new rehabilitative studies in the District Court, the facts and assumptions of which were never released. Nor is it contested that even as late as the Court of Appeals, defendants advanced a new factual argument relating to segments and other changes, although there was no way at that time to demonstrate what petitioner asserted, that the new claims were equally false.

Nor is it disputed that defendants, in 1997 before publishing the FEIS, after conducting the falsified studies, decided to continue to exclude the environmental effects in Buckingham from the FEIS, at a meeting held to discuss what to do, and also decided to utilize a preexisting different project, renaming it as an independent project, to alleviate the effects of the project at the Buckingham boundary (not addressing the effects moved over to the next intersection), and falsely described it in the EIS (FEIS, App 2-000548a) and continuing into the District Court as an independent project, *Buckingham Township*, 157 F. Supp.2d at 463, only abandoning their characterization in the Court of Appeals.

The issue is that the Third Circuit, in upholding the District Court and acknowledging that "defendants were less than forthcoming" and that the issues were "serious", nevertheless chose to overlook all of those defects, which effectively meant that in no way could the EIS be described as an explication of the environmental consequences of the project nor a discussion of alternatives to the project, including the most practicable alternative identified as such by the defendants (the arterial).

Either combined with the Third Circuit's virtual prohibition of the receipt of evidence, (see Section II, *infra*) in which the Third Circuit is at the extreme end of an inconsistent spectrum, or alone, the Courts' willingness to accept this kind of imperfection at a minimum entails confusion as to whether the courts must defer to non-disclosure and misleading project-biased EIS's: although in most types of cases, this Court's jurisprudence and Rule 56 would require a trial, and yet the deference to agencies is misapplied to a situation where the issue is not the validity of the ultimate judgment, a matter as to which the agency has wide, if not unreviewable discretion; but rather the duty to disclose, a matter as to which the agency has little if any discretion under NEPA.

The Third Circuit has placed itself at the far end of the spectrum, which petitioner submits not only reflects a split in the circuits, but runs the substantial probability of misapplication of this Court's substantive mandate in a way that would undermine this Court's policies on implementation of the statute, or even, without exaggerating, completely negate not only the statutory mandate, but this Court's direction regarding its implementation. These cases create not only inconsistency in the application of the statute and inconsistency with this Court's mandates, but, perhaps most importantly as serious a crisis as could be imagined in the confidence of the public and a deserved crisis of confidence as to whether government is interested and willing to comply with the law. It is a throwback, indeed, to early common law, in which there was trial by swearing, and no real process for determining the truth. Although the comparison sounds ludicrous, to the public, there is no significant difference, if agencies are permitted to comply with the statutory mandate requiring a disclosure by simply asserting that they have studied and disclosed, and presenting what they choose, and not actually doing so. Therefore, not only is the Third Circuit rule an evasion of the requirements of judicial review, but it is a formula for disregarding not only truth, but even good faith in the purported

factual presentation. If there is no hearing and there is no requirement of compliance of full disclosure by other means, but rather a decision as to whether the project is good, and the agencies have recited the proper mantra, then not only NEPA, but the entire rule of law is threatened.

Instead, the courts are acting based on their independent predilections concerning the wisdom – desirability of the project (Appendix B at 23, 25, 33), an ironic turn in a situation where this Court has prohibited exactly that result: it has commanded that NEPA not be utilized to subject the substantive decision to review.

III. A RULE IS NEEDED AS TO WHEN EVIDENCE IS ALLOWED TO DETERMINE THE SIGNIFICANCE AND GOOD FAITH OF OMISSIONS FROM THE RECORD

Overton Park held that the focus of review of a decision is the propriety of the administrator's action. 401 U.S. at 416-17. In *Camp v. Pitts*, 411 U.S. 138 (1973), this Court applied that concept to hold that the de novo hearings are not appropriate in the District court, although it was authorized to obtain additional evidence to explain the administrative decision. Some Courts of Appeals have taken this to limit testimony to "explanations", but they fail to understand that this Court's admonition in that case was in the context of a situation where the record decision had been found to inadequately explain the agency's decision. There was no issue of suppression, bad faith, or other matters, and therefore no occasion for this Court to specify the appropriate procedure in such cases. Moreover, the statement in *Camp v. Pitts* that the "focal point for judicial review should be the administrative record already in existence" is also directed to a situation where the problem was the inadequacy of the explanation tying the record to the decision; not issues present

in NEPA cases, and particularly in this case: where the record had been improperly truncated, or improperly made, or made in bad faith.

Pursuant to *Camp v. Pitts*, derived from *Overton*, further extended in dicta in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), the district courts are now instructed that they may not allow evidence except in rare cases. However, *Lorion* does not identify, and the circuit courts have not been consistent in identifying what these cases are. In *Camp*, this Court held that the record should be the "focal point for judicial review", not that new evidence should not be admitted. *Camp*, 411 U.S. at 142. Thus, it is clear that this Court has left room for the admission of evidence but when and whether the proper case exists is not clear. One result has been to encourage a proliferation of actions which involve "bad faith", of which this case is only one of the more extreme, along with *Sierra Club v. Corps. of Engineers*, 701 F.2d 1011 (2d Cir. 1983) and *Sierra Club v. Corps. of Engineers*, 772 F.2d 1043 (2d Cir. 1985), the Second Circuit cases involving a highway project known as Westway. The approach in the two cases illustrates both the need for testimony and the need for this Court's clarification. In *Westway*, the District Court held two trials, the first of which disclosed that the defendant Corps of Engineers had knowingly concealed evidence that there was a serious impact of the proposed project on the environment, and the second of which showed that the studies on remand had again in a different way concealed the adverse environmental impacts. The Second Circuit on appeal from the second hearing, admonished the district judge to rein in its trial. *Sierra Club*, 772 F.2d at 1052-53.

Other circuits have taken a varying and inconsistent approach, which has caused inconsistent outcomes in different circuits.

Like the Third Circuit, the Seventh Circuit has stringently restricted the use of evidence. *See Cronin v. United States Department of Agriculture*, 919 F.2d 439 (7th Cir. 1990). It held that the district court should conduct an evidentiary hearing only in "an emergency." *Id.* at 444.

The First Circuit has been more open to evidence. Trying to respect *Camp* and *Lorion*, however, it has focused on using evidence as explanation, rather than to determine facts in an apparent effort to respect their apparent interpretation of this Court's decision in *Lorion*. *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st Cir. 1999); *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992).

The Second, Ninth, and Fourth Circuits have been even more open to evidence in these cases, sometimes for broader reasons beyond explanation. *See National Audubon Society v. Hoffman*, 132 F.3d 7 (2d Cir. 1997); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *National Audubon Society v. U.S. Forest Service*, 46 F.3d 1437 (9th Cir. 1994); *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983). In *County of Suffolk*, the Second Circuit explained:

> [I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored . . . Generally . . . allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept "stubborn

> problems or serious criticism under the rug," raise issues sufficiently important to permit the introduction of new evidence in the district court . . .

County of Suffolk, 562 F.2d at 1384-85 (citation omitted).

The effect of the Second Circuit's decision in *County of Suffolk* has been described by a commentator as follows:

> County of Suffolk laid the groundwork for wide acceptance of plaintiffs' use of extra-record evidence in challenging agencies' compliance with NEPA. The use of evidentiary trials and hearings, expert witnesses, and expert affidavits and other evidentiary documents challenging agencies' environmental reviews has become commonplace in NEPA cases, especially in those circuits that are most familiar with NEPA. The rationale behind courts' acceptance of extra-record evidence, however, is rarely fully articulated. A few circuits have followed the reasoning of Suffolk explicitly. Many circuits, however, allow evidence inconsistently or under broader theories that go beyond the confines of NEPA. Some circuits seem to accept extra-record evidence in NEPA cases almost as a matter of course.

Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929 (1993). This law is consistent with *Overton*. But *Suffolk* pre-dated *Lorian*, and courts, such as the Third Circuit, need clarification.

With the exception of *Westway* and the present case, none of the decisions deals explicitly with the District Court's use of

trial to make factual findings as to good faith. Yet this Court's *Overton* decision, and cases of this Court in other areas show that good faith is an implicit or explicit requirement, and that evidence is necessary in cases where no formal record has been developed before the agency, and the agency can pick and choose what it submits as having been before the secretary.

It is clear, therefore from the confused nature and varying responses by the courts of appeal to the problem of inadequate disclosure and the reasons for inadequate disclosure in the NEPA cases (not, as in *Camp*, inadequate rationale tying the record to the decision), that an evidentiary hearing may be necessary, and "the focal point for judicial review" is not limited to the administrative record submitted by the agency, but the question as to whether the self-limited administrative record already in existence is itself the result of a fatal violation of the statutory mandate, which is to have a substantially complete record in existence, adequately exploring, identifying, and analyzing the environmental impacts of and the alternatives to the proposed action.

In considering the need for a clearer rule, it is significant that the initial declaration of *Overton*, that the Secretary's decision be the focus, and that the record be supplemented as necessary, morphed through *Camp* (a per curiam decision) and *Lorion* into differing degrees of restriction without benefit of an actual issue of record manipulation. Without such an actual case raising the issue, it seems no more than administratively efficient, as was suggested in both *Camp* and *Lorion*, to review a packaged record. However, when involving an agency which is not regulatory in nature, but project oriented, such as the FHWA, this line of thinking becomes dangerous if not indeed unrealistic. It is one thing to assume that a commission (*Lorion*) or a bank regulator (*Camp*) will fairly compile a record; it is another thing to definitely assume that a project oriented agency will do so. In fact, both as written and as interpreted by this

Court, NEPA represents a finding of the need for a specific mandate to explicate the data in contrast to the fact that with respect to the controller or bankruptcy, there is no command to make and distribute a draft complete record for comment. In fact, although the issue of disclosure was not in question in *Lorion* itself, the history of the agency at issue in *Lorion* coincidentally provides the most stark example of the need for a different rule where an agency is in the essential conflict position, which is a major underpinning of the NEPA mandate insistence on disclosure to avoid bias. The very combination of project orientation and regulation in the Atomic Energy Commission was assigned a critical portion of the blame for inadequate safety measures (a project agency's unwanted downside) in nuclear regulation, leading, most importantly, to the division of the project oriented functions and the regulatory functions through the creation of the Nuclear Regulatory Commission and the energy department. *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 122 (1983). "The evident desire of Congress to prevent safety from being compromised by promotional concerns."

This is reflected, indeed, in the language of this Court in upholding the importance of the NEPA mandate of disclosure, see *Kleppe*, 427 U.S. at 409; *Marsh*, 490 U.S. at 371; surely a needless gesture if it were not for the proclivity of project oriented agencies to neglect or deny public or self awareness of the environmental effects of the projects, absent compliance with the statute. In this instance, it is naive, or uncaring to preclude the challenger from proving that the agency suppressed highly relevant and significant information from the record. At a minimum, the uniformity – consistent in administrative decision making; despite its importance, is defeated. *See Dickinson v. Zurko*, 527 U.S. 150, 154 (1999).

In short, a decision specific to one subject of the judicial review of administrative action and the procedural approach to

that action in the reviewing Court, *Camp* is not appropriately applied as if centrally relevant or even controlling to review of a different nature in a different situation, *i.e.*, where the focus is not on the adequacy of the explanation; but rather the compliance with the statutory mandate to actively search for all impacts and adequately address and analyze them, and also the alternatives.

The necessary standard in these circumstances is to allow the district court to receive evidence to establish whether the appropriate true material is in the record, and if not, why it was not disclosed, was not analyzed, and why instead other false data were substituted, so that the reviewing court may determine whether the agency met the disclosure standard and conducted a good faith effort to comply with NEPA, or whether it intentionally, or negligently failed to do so.

Thus, the pernicious effect of the Third Circuit approach of relaxed compliance with NEPA's procedural compliance described, Part I *supra*, is magnified and compounded by another practice: the most restrictive of all the circuits in refusing to allow challenger testimony. Despite the fact that there is no opportunity to make a formal record before the agency, with no opportunity to cross-examine, and no opportunity to respond through testimony to materials submitted to a District Court, the Third Circuit rule consistently exercises judgment regarding the substance of the matter and the evidence (e.g. "no demonstration of bad faith" (Appendix B at 33)).

Where the critical issue involves, as here, not only the adequacy of the last best affidavits of the agency, in explicating the facts, analysis, and conclusions; and thus the good faith of the agency, *i.e.*, the motivation behind the coverup and falsification, the difference among the circuits on this subject of accepting evidence becomes more critical. As interpreted by this Court, the statutory mandate clearly depends on enforcement

of the explication obligation. It requires that the agency be reviewed to ensure that the facts are explicated. NEPA does not merely require the agency to discuss and consider the environmental effects; it is requested to publish all the data so that everybody can see it. Exposing it to the light of day is necessary. This Court has interpreted the statutory mandate as such. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989) (broad dissemination of information is mandated by NEPA).

Here, the "secretary" specifically made a conscious decision to exclude Buckingham impacts at the beginning of the EIS study process; and later made an explicit decision to convert the leading alternative to an expressway thus nearly doubling the traffic and the impact, without including the arterial in the EIS as an alternative, which had the obviously intended effect of avoiding outsiders' opportunity to choose between the two alternatives, despite the specific rule to display the alternatives and give substantial consideration to each one (flowing from the separate requirement of alternative consideration in NEPA Section 102(2)(E)). *See Kleppe*, 427 U.S. at 398.

Further, the circumstantial evidence clearly shows prima facie that after the issue of effects on Buckingham was raised in the DEIS, the agency conducted a traffic study, shoved it under the rug when it was not satisfactory initially, later mischaracterized the initial study as "an interim", or incomplete, or "four of fifteen" iterations, when it was discovered, and after it had been modified, and truncated, falsified, and issued it in falsified fashion, in the FEIS; and again decided to exclude Buckingham impacts from the EIS, while developing a mitigation measure actually in Buckingham, and falsely characterizing it as an independent project so as to again avoid dealing with the impacts in Buckingham (and combining the project or issuing an EIS on the mitigation measures). Singly and certainly cumulatively, these facts if true negate the

agency's good faith, where Buckingham fully documented each of the foregoing events. The district court said that nothing had been shown by way of bad faith, and this could only have meant that Buckingham did not have evidence that this pattern of misstated and suppression represented subjective evil intent; but the facts, under normal standards of summary judgment, clearly require an opportunity for evidentiary hearing before reaching that conclusion. Yet, following Third Circuit practice, the District Court, and the Court of Appeals by adoption in its characterization, no hearing could be held. Clearly, the Third Circuit has created a rule that is pernicious and unacceptable, and inconsistent with this Court's mandate and other circuits, that will eviscerate the statutory mandate.

IV. THE EFFECT OF THE PRESENT THIRD CIRCUIT RULE IS SIGNIFICANTLY ADVERSE

The message that this case and others like it send to the other circuits is that this Court's interpretation of NEPA as mandatory is merely precatory: that an agency may circumvent NEPA by simply not disclosing what it chooses not to disclose, by misrepresenting what it is required to review or disclose, and by simply reciting the mantra of statutory compliance, while in reality, negating statutory compliance. To the extent that the Third Circuit application enables agency practice in the Third Circuit, it is a license to negate NEPA, which is inconsistent with the rule in other circuits, as well as with this Court's mandate.

Through its duality of softening the mandatory disclosure requirements, and its refusal to allow the District Courts to take evidence regarding the circumstances of cover ups, the Third Circuit creates an essentially non-reviewable agency action, clearly contrary to the repeated decisions of this Court. Other circuits have not fallen into this trap, but there is a sufficient confusion, and clear inconsistency, that review, clarification and

direction from this Court is necessary. Although NEPA is procedural, the requirements of the statute for disclosure acquire significance beyond the hope for agency good faith consideration of the results, to the extent they are adopted by the agency in independent categorical statutory regulations, or statutory requirements for consideration of the matters. Thus, for example, as applicable here, the FHWA regulations require consideration of the matters addressed in the EIS, in certain sections of the highway regulations. Thus, the disclosure requirements are enforceable not only through the good faith of the agency, but also through independent agency regulations. Therefore, it is all the more significant that the disclosure requirement be actively enforced.

Ironically, the district court in negating bad faith asked rhetorically why an agency would forego a superior project (Appendix B at 33), thus demonstrates why stricter review and NEPA itself is needed: what may be superior for the agency may be less desirable if the environmental considerations are factored into the equation.

As this Court has repeatedly stressed, that laws without full and necessary powers to police are meaningless to protect the citizens. It does not in any way entail the suggestion that agencies are prone to bad motives to recognize that the failure to enforce the NEPA disclosure rule is an invitation to negate inconvenient restrictions. (It is not necessary for this Court to find that the facts were as asserted and sworn to by the Township expert consultant; it is only necessary that the Court accept the uncontested fact that petitioner presented substantial evidence to that effect, which was substantially confirmed, and that there has to be a procedure for the resolution of such issues). If a remand is the required procedure, in the case where there is substantial issue of fact, that must be asserted; petitioner's alternative request for that procedure was not granted either.

V. ELEVENTH AMENDMENT IMMUNITY SHOULD NOT APPLY, AFTER *LAPIDES*, TO A STATE THAT INTERVENES

In the district court here, the state by its Secretary of Transportation, was permitted to intervene on his request. Petitioner was then permitted to amend to assert state law claims, violation of state highway and environmental laws. (App 000483a, 000585 to 000589) Then, however, based on the Eleventh Amendment, the Court granted the state's motion for Partial Summary Judgment, relying on *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467 (1945) (Appendix C).

The Eleventh Amendment immunity issue is very current. It was twice before this Court in the 2001 term. In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. __ (2002), the Court decided that the Eleventh Amendment immunity does not apply to state law issues where the state has removed the matter to the federal court. This court did not address the same issue where the state has intervened in an action already pending in federal court. Moreover, even more recently in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), the opinion for this court left open the issue whether direct action against the state in a situation where no damages are sought is permissible (relying on *Ex Parte Young* to permit suits against the officer).

The issue of the effect of voluntary intervention thus left open and/or undecided in this court are squarely involved in this case, and this case presents a need and an opportunity to clarify issues not determined in those cases. The same considerations; unfair litigation advantage, which were dispositive in *Lapides*, were achieved by the state in this case. Indeed eighteen months later, the district court gratuitously held that the state law was satisfied. (Appendix B at 13). In this case, the state official, acting as the state, had voluntarily

intervened to defend the FHWA action, which it had advocated and written. The District Court agreed with most of the circuits, that a state official covered by *Ex Parte Young* could intervene to address the federal issues, while retaining Eleventh Amendment immunity from jurisdiction of the state law claims. Intervention in a proceeding in the federal court is different than removal, and therefore, clarification of *Lapides* by this court is required. As the law stands, in the Third Circuit and others, a state or its officials may not remove to the federal courts without making themselves liable to have the federal court determine state law issues; however, a state official may intervene in a federal court proceeding and block the determination of those issues.

CONCLUSION

For the foregoing reasons, Buckingham Township respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ROBERT R. ELLIOTT
Counsel of Record
ROBERT J. SUGARMAN
3521 Prospect NW
Suite 500
Washington, D.C. 20007
(202) 338-5835
Attorneys for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JANUARY 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2673

BUCKINGHAM TOWNSHIP,

Appellant,

v.

KEN WYKLE, HONORABLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; DELAWARE VALLEY REGIONAL PLANNING COMMISSION

BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Intervenor in District Court.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 99-cv-00621)
District Judge: Honorable Jay C. Waldman

Argued October 30, 2001

Before: SLOVITER, NYGAARD, and AMBRO,
Circuit Judges

(Opinion filed January 7, 2002)

* * *

Appendix A

MEMORANDUM OPINION

AMBRO, *Circuit Judge*

Buckingham Township appeals the District Court's entry of summary judgment for the defendant agencies in its suit challenging their approval of an improvement to U.S. Route 202, Section 700 and the development of an interchange at the intersection of Route 202 and State Route 313 (also known as Pools Corner). The District Court wrote an excellent opinion that thoroughly addressed each of the numerous issues raised by Buckingham Township in its lengthy brief. We have nothing to add to that Court's fine opinion, and thus affirm.

This summary affirmance is not meant to imply that Buckingham Township raised frivolous issues. Indeed, it raised serious questions with respect to the procedures followed by the agencies. For example, they could have done a better job of apprising Buckingham Township of the progress of the Section 700 and Pools Corner projects. Further, they could have been more forthcoming in explaining adjustments to the data generated by their computer models. While we believe that the District Court answered these concerns admirably, nonetheless we encourage the agencies to keep Buckingham Township fully in the loop during upcoming projects (and phases of current projects) affecting Buckingham Township.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/ Thomas L. Ambro
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2673

BUCKINGHAM TOWNSHIP,

Appellant,

v.

KEN WYKLE, HONORABLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; DELAWARE VALLEY REGIONAL PLANNING COMMISSION

BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Intervenor in District Court.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 99-cv-00621)
District Judge: Honorable Jay C. Waldman

Argued October 30, 2001

Before: SLOVITER, NYGAARD, and AMBRO,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on October 30, 2001.

Appendix A

On consideration whereof, it is now ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered June 22, 2001, be and the same is hereby AFFIRMED. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ [illegible]
Clerk

DATED: January 7, 2002

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 21, 2001 AND ENTERED AND FILED JUNE 22, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 99-621

BUCKINGHAM TOWNSHIP,

v.

HON. KEN WYKLE, ADMINISTRATOR,
FEDERAL HIGHWAY ADMINISTRATION,

DAVID LAWTON, CHIEF OF PLANNING, REGION 3,
FEDERAL HIGHWAY ADMINISTRATION, and

BRADLEY L. MALLORY, SECRETARY FOR
THE DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF PENNSYLVANIA

MEMORANDUM

WALDMAN, J. June 22, 2001

I. *Introduction*

This case arises out of the proposed improvement of U.S. Route 202, Section 700 ("Section 700") and development of

an interchange at Route 202 and State Route 313. Plaintiff is concerned that peaceful and scenic Buckingham Township in Bucks County will be spoiled if defendants are allowed to proceed as planned.

As a federal aid project, the Section 700 project is subject to various federal statutory requirements. In a 97 page amended complaint, plaintiff alleges that defendants used falsified data and violated virtually every applicable statutory requirement in planning and proceeding with the highway project. Plaintiff specifically claims that defendants violated requirements imposed by the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; the Federal-Aid Highway Act ("FAHA"), 23 U.S.C. §§ 109(a)(2) & (h), 134, 135; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; the Clean Air Act ("CAA"), 42 U.S.C. §§ 7506; and, the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f & 470h-2(f).[1]

Plaintiff also asserts state law claims under statutes governing the duties of PennDOT, 71 P.S. § 512(a)(7) & (b)(23), requiring PennDOT to assist local officials, 36 P.S. §§ 670-901, and adopting an interstate compact on regional transportation, 73 P.S. § 701.[2]

---

1. The alleged violation of each discrete requirement of each pertinent statute is pled as a claim, resulting in a 14 count complaint.

2. 71 P.S. § 512(a)(7) requires PennDOT to cooperate with other appropriate agencies, political subdivisions and interested private parties in coordinating plans and policies for the development of air, ground and water commerce. Section (b)(23) directs the Department

(Cont'd)

Appendix B

Presently before the court are defendants' motion for summary judgment and plaintiff's motion for summary judgment. The administrative record is voluminous and quite technical in nature. It consists of thousands of documents which consume twenty-one boxes. The parties have also presented substantial submissions. Additionally, briefs were filed on behalf of seventeen amici.[3]

II. *Standard of Review*

Summary judgment generally is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under the APA, the court bases its decision on a review of the administrative record. *See* 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). There are thus generally no genuine issues of material fact in an APA case. *See Clairton Sportsmen's Club v. Pennsylvania Turnpike Comm'n*, 882 F. Supp. 455, 463 (W.D. Pa. 1995).

(Cont'd)

to consider the operation and use of existing transportation routes and programs during construction and following completion of new routes or programs. 36 P.S. § 670-901 directs PennDOT to assist local officials with standards, methods and information related to the construction, alteration, repair and maintenance of highways and bridges. The interstate compact creates a mechanism to coordinate regional transportation planning among several counties in southeastern Pennsylvania and southern New Jersey.

3. Eleven amici, including two area municipalities, oppose the project. Six amici, all area municipalities, support the project.

As a practical matter, "when a plaintiff who has no right to a trial de novo brings an action to review an administrative record which is before the reviewing court, the case is ripe for summary disposition, for whether the order is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law." *Bank of Commerce of Laredo v. City Nat'l Bank of Laredo*, 484 F.2d 284, 289 (5th Cir. 1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1310 (6th Cir. 1970) (cases challenging administrative action ripe for summary judgment), *rev'd on other grounds*, 401 U.S. 402 (1971). *See also Lukens Steel Co. v. Kreps*, 477 F. Supp. 444, 446 n.3 (E.D. Pa. 1979) (denial of summary judgment in administrative action generally means opposing party is entitled to judgment based on the record or a remand to the agency is required because its action is not supported by the record under applicable standards of review and further proceedings are necessary.)

III. *Historical and Factual Background*

Section 700 of U.S. Route 202 extends from just south of Pennsylvania State Route 63 in Montgomery Township, Montgomery County, to the Pennsylvania State Route 611 Bypass in Doylestown Township, Bucks County. This section of highway is approximately nine miles in length and covers 9,100 acres. It crosses two counties and eight municipalities.[4]

---

4. The counties are Bucks and Montgomery. The municipalities are Upper Gwynedd Township, Lower Gwynedd Township, Montgomery Township, New Britain Borough, New Britain Township, Chalfont Borough, Doylestown Township and Warrington Township.

Appendix B

In response to requests from local and county planners, the Delaware Valley Regional Planning Commission ("DVRPC") recommended in a November 1989 report that studies be commenced to address mobility deficiencies and projected growth with respect to Section 700.[5] In the November 1989 report, the DVRPC concluded that the "new alignment corridor" which had been recommended in a 1968 PennDOT study regarding this section of highway was still viable through lands mostly reserved for the highway by local township actions.[6]

In 1990, PennDOT initiated more detailed environmental and preliminary engineering studies for Section 700. PennDOT advertised and held four public meetings between February 7, 1991 and December 13, 1994 concerning studies of improvements to Section 700, prior to initiating the formal environmental process.

Pursuant to NEPA and its attendant FHWA regulations, the Federal Highway Administration ("FHWA"), as lead

---

5. The DVRPC is the designated metropolitan planning organization for the Philadelphia region and has both state and local government representation, including representatives from Montgomery and Bucks Counties. The DVRPC was originally named as a defendant and then dismissed by order of March 31, 2000.

6. The "new alignment corridor" represents one option for improvement of Section 700. Plaintiff suggests that the improvement of Section 700 is not "local" in nature but rather an attempt by defendants, PennDOT, NJDOT and the DVRPC to transform Route 202 into a multi-lane regional superhighway to provide for commerce and growth between New Jersey's major interstate highways and Interstate-76 at Valley Forge.

agency, approved a draft Environmental Impact Statement ("DEIS") for circulation on July 10, 1996.[7] The DEIS was circulated to the public, and its availability was published in the Federal Register on August 9, 1996. *See* 61 Fed. Reg. 41607-41608.

On September 12, 1996, PennDOT held an open hearing at which members of the public were provided an opportunity to comment on the DEIS. Plaintiff's representatives were among the numerous participants. PennDOT also held a meeting directly with members of plaintiff's Board of Supervisors on September 19, 1996.

After seeking and receiving an extension of time to submit comments, plaintiff submitted extensive comments on the DEIS on October 11, 1996. In response to plaintiff's comments, additional traffic analysis was completed to verify the accuracy of the prior analysis.

The final report of the additional traffic analysis was documented in Supplement No. 4 which was finalized in October 1997 and to which the final Environmental Impact Statement ("FEIS") expressly referred. This was available for public review and comment. Supplement No. 4 was provided to plaintiff on October 10, 1997.[8]

---

7. "Lead Agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement." 40 C.F.R. § 1508.16.

8. A draft of Supplement No. 4 was prepared in February 1997. It is virtually identical to the final document. It was provided to plaintiff in August 1997.

Appendix B

Plaintiff learned during this period that PennDOT was also making plans to develop a highway interchange at Pools Corner in Buckingham Township. PennDOT represents that this is independent from the Section 700 project. Plaintiff suggests that it is a remedial measure to cope with traffic which the Section 700 improvements would discharge into Buckingham Township.

On October 8, 1997, PennDOT approved the FEIS for circulation. On October 16, 1997, David Lawton, the FHWA Region 3 Director of Planning and Program Development, approved the FEIS for circulation. Hundreds of copies of the FEIS were mailed to commentators, including plaintiff. On November 14, 1997, notice of availability of the FEIS was published in the Federal Register. *See* 62 Fed. Reg. 61111-61112. By letter of January 29, 1998 to the FHWA Division Administrator, the Regional Deputy Director of the Office of Environmental Programs advised that "EPA believes that the highway construction and operation should not provide additional insult to the environment" and stated that "[w]e applaud PADOT and FHWA for [their] efforts" to protect the environment.

On August 27, 1998, the FHWA Division Administrator issued a Record of Decision ("ROD") formally approving the project. The FHWA filed the Administrative Record ("the Record") for the Section 700 project and the project at Pools Corner which the FHWA had also approved following environmental review.

Following initiation of this action, the court on November 19, 1999 ordered defendants to make the Record

whole by "filing and providing to plaintiff all documentation, correspondence, set-ups, assumptions, formulae, co-efficients and other data concerning U.S. 202 Traffic Analysis for Section 700 Supplement No. 4 and DVRPC Responses to Buckingham Comments 1-4 (April 1998), all communications between the Pennsylvania Department of Transportation and the Federal Highway Administration and within the FHWA regarding the relationship between the Pool's Corner project and Section 700, and any version of Supplement No. 4 dated December 1996 which may exist." On December 17, 1999, defendants supplemented the Record pursuant to that order.

Pointing to statements of two DVRPC employees that certain set-ups and assumptions had been discarded by the DVRPC, plaintiff suggested that the Record was still incomplete. Defendants responded that some of the set-ups and assumptions from the traffic model used to conduct the analysis in Supplement No. 4 were not available as they existed at the time simply because the traffic model is a computer program which is constantly revised in the ordinary course of business to accommodate updated forecasting methodology, computer technology, population changes and traffic-related data.

Defendants have persistently averred that the Record as supplemented is the complete record before the FHWA at the time it filed the ROD. W. Thomas Walker of DVRPC pinpointed the data and documents sought by plaintiff in the Record.[9]

---

9. Dr. Walker explained how Supplement No. 4 could be replicated by a competent analyst using the TRANPLAN program in conjunction with the "Network," the "prototype Setups" and the trip tables which were included in the December 17, 1999 filing.

Appendix B

The court ordered defendants to produce to plaintiff the documentation, correspondence, set-ups, assumptions, formulae, co-efficients and other data supporting Supplement No. 4 in a computer diskette format prepared for use with the TRANPLAN program; to produce to plaintiff a copy of the TRANPLAN program and any instructions necessary for running the program; and, to file sworn affidavits from persons with direct knowledge verifying that defendants have filed in the administrative record and produced to plaintiff all documents, data and other pertinent information on which the FHWA relied in creating the ROD or which served as the basis for any information on which the FHWA so relied, and detailing the nature of any assumptions, set-ups or related data which had been irretrievably discarded or lost and the reasons therefor. Defendants complied with that order.

IV. *Discussion*

As noted, the administrative record is voluminous and quite technical, and the submissions of the parties are substantial. While this has necessitated an exhaustive review, encumbered further by the court's prior lack of familiarity with some of the technical methodology and terminology, the court will confine itself herein to a summary of the respective positions and corresponding evidence in the Record. To discuss in detail each item in the Record or each assertion, insinuation and argument in this highly contentious litigation would be forbidding and require the razing of a small forest to supply the paper needed for such a product.

Appendix B

A. Cognizable Claims

Many of the discrete claims asserted by plaintiff are not cognizable.

The provision of the FAHA relied upon by plaintiff, 23 U.S.C. § 109(a)(2), particularly when read in the context of the surrounding language, constitutes nothing more than a general statement of policy which does not imply a private right of action. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999). The FAHA amendments in the Intermodal Surface Transportation Efficiency Act ("ISTEA") also do not authorize a private right of action. *See Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Committee*, 840 F.2d 258, 265-67 (5th Cir. 1988); *Sierra Club v. Pena*, 915 F. Supp. 1381, 1390-91 (N.D. Ohio 1996), *aff'd sub nom., Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997).

There is no private right of action under the citizen suit provision of the Clean Air Act for the violation of the Act alleged by plaintiff. *See* 42 U.S.C. § 7506(c); *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1260 (1st Cir. 1996); *American Auto. Mfrs. Ass'n. v. Cahill*, 53 F. Supp. 2d 174, 186 (N.D.N.Y. 1999); *City of Yakima v. Surface Transp. Bd.*, 46 F. Supp. 2d 1092, 1099 (E.D. Wash. 1999).

There is similarly no private right of action under NEPA. *See Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 436-39 (5th Cir. 1981) ("[T]o the extent the legislative history indicates any Congressional attitude, it indicates a desire not to provide a remedy for private

individuals who may be injured by a violation of NEPA"), *cert. denied*, 454 U.S. 1126 (1981); *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 186 (no private right of action for failure to prepare proper EIS); *Public Citizen v. United States Trade Rep.*, 5 F.3d 549, 551 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (same); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (no private right of action for failure to prepare supplemental EIS); *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998) (NEPA does not provide private right of action and any claim for failure to prepare proper EIS must be maintained under APA); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1353 n.13 (9th Cir. 1994) (NEPA does not provide private right of action to challenge sufficiency of EIS); *Public Citizen v. Office of U.S. Trade Reps.*, 970 F.2d 916, 918 (D.C. Cir. 1992) (same); *Knowles v. United States Coast Guard*, 924 F. Supp. 593, 599 (S.D.N.Y. 1996) (reclassifying NEPA claim for failure to prepare EIS as claim under APA); *Westlands Water Dist. v. United States Dep't of Interior*, 850 F. Supp. 1388, 1411 (E.D. Cal. 1994) (same).

Insofar as defendants may have violated the standards established by the FAHA, ISTEA, CAA or NEPA, however, such conduct could be characterized as arbitrary, capricious or an abuse of discretion. The court will thus assess those actions in considering the APA claim.

As plaintiff may obtain relief against defendants Wykle and Lawton, plaintiff's APA claim against defendant Mallory clearly is not a claim "for which there is no other adequate remedy." *See* 5 U.S.C. § 704(a); *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7, 14 (2d Cir. 1995);

Washington Legal Found. v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993); *Gillis v. United States Dep't of Health & Human Svcs.*, 759 F.2d 565, 575 (6th Cir. 1985). Judgment for defendant Mallory is thus appropriate on that claim.

In this circuit at least, a private right of action under NHPA has been recognized. *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991). The court will thus separately consider plaintiff's NHPA claim.

There is no private right of action conferred by the interstate compact and there has in any event been no showing that any signatory has violated the compact. The federal defendants, of course, are not constrained by duties imposed by state law on a state agency. The court has no authority to review the compliance of state officials with state law and accordingly dismissed by prior order the state law claims against defendant Mallory. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120-12 (1984); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *Blake v. Papadakos*, 953 F.2d 68, 73 n.5 (3d Cir. 1992); *Fitzpatrick v. Pennsylvania Dep't. Of Transp.*, 40 F. Supp. 2d 631, 635 (E.D. Pa. 1999). In any event, it is clear that PennDOT did not disregard any duty imposed by 71 P.S. § § 512(a)(7) and (b)(23) or 36 P.S. §§ 670-901.

B. Administrative Procedures Act Claim

Under the APA, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A). The agency's decision "is entitled to a presumption of regularity." *Overton Park*, 401 U.S. at 415, 91 S. Ct. 814. "[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416. While the "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Id.*

The court's review is limited to the whole administrative record before the relevant agency at the time of its decision. *See* 5 U.S.C. § 706; Overton Park, Inc., 401 U.S. at 420; *Higgins v. Kelly*, 574 F.2d 789, 792-94 (3d Cir. 1978); *Twiggs v. U.S. Small Bus. Admin.*, 541 F.2d 150, 152-53 (3d Cir. 1976). However, "[a] document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record." *Clairton Sportsmen's Club*, 882 F. Supp. at 465. Pertinent information upon which administrative decisionmakers may have relied may be considered although not included in the record as filed. *See Higgins*, 574 F.2d at 792-93.

The ultimate question is whether the Record supports the FHWA's decision and not whether a different decision would have been better or might have been made with more information. The court is not empowered to determine the wisdom of relieving traffic congestion in one geographic area by shifting some of the burden into another. *See Overton Park*, 401 U.S. at 416 (reviewing "court is not empowered to substitute its judgment for that of the agency"). *See also C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171, 182 (3d Cir. 1996). That is a decision legally left to the expertise of the FHWA.

The APA so limits the role of the court because Congress has determined that "the elements that make up such decisionmaking are so diverse that they are consigned to officials and agencies with specialized knowledge, experience, resources, and mechanisms for broad public participation that a court does not possess [and the courts] are not free to weigh the many competing interests underlying these issues." *Calio v. Pennsylvania Dep't of Transp.*, 101 F. Supp. 2d 325, 328-29 (E.D. Pa. 2000). However, "[i]f the record before the agency does not support the agency action, or if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, a court should remand to the agency for additional investigation or explanation." *Society Hill Towers Owners' Ass'n v. Rendell*, 20 F. Supp. 2d 855, 862 (E.D. Pa. 1998).

The Record consists of numerous interagency communications and reports based on studies conducted by the FHWA and PennDOT. This includes a Draft Environmental Impact Statement/ Section 4(f) Evaluation ("DEIS"); a Final Environmental Impact Statement/Section 4(f) Evaluation ("FEIS"); Historic Structures Inventory and Determination of Eligibility Reports; Criteria of Effect Reports; a wetlands report; noise reports; Congestion Managements Strategies and Major Investment Study; a Memorandum of agreement between FHWA and the Pennsylvania State Historic Preservation Office; and, documents related to studies regarding the Pools Corner project.[10]

10. The parties have also submitted affidavits or declarations of experts. Some are accompanied only by a photocopied or facsimile signature and a submission of plaintiff's retained expert Dr. Tomazinis (Cont'd)

Appendix B

1. FAHA and ISTEA

In Counts I, II, V and XII of its Amended Complaint, plaintiff alleges that defendants failed to comply with planning regulations and with the requirements for the Transportation Plan and Program, the Congestion Management Analysis ("CMS") and the major investment study ("MIS").

(Cont'd)

is replete with handwritten edits which appear to be made by the same individual who scribbled handwritten edits in the body of plaintiff's "supplementation." As no party has objected to the form of any affidavit, the court will not reject any on that ground. *See United States for Use and Benefit of Austin v. Western Elec. Co.*, 337 F.2d 568, 574-75 (9th Cir. 1964). Additional substantive submissions, including expert opinions and suppositions or inquiries about the mental processes of the decisionmakers, however, are not cognizable absent "a strong showing of bad faith or other improper behavior" on the part of the agency. *See Overton Park*, 401 U.S. at 420; *Society Hill Towers Owners' Ass'n*, 20 F. Supp. 2d at 863. There has been no such a showing. A party may not undermine an agency decision even with an affidavit of unquestioned integrity from an expert expressing disagreement with the views of other qualified experts relied on by the agency, and a court may not weigh the contrary views of such experts to assess which may be more persuasive. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Price R. Neighborhood Ass'n. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997). An agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion and studies in its best reasoned judgment based on the evidence before it. *See Hughes River Watershed v. Johnson*, 165 F.3d 283, 289-90 (4th Cir. 1999); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987). As a practical matter, were it otherwise, virtually every agency action involving expertise or technical analyses could be obstructed by a party who engaged an expert willing to disagree with the views or conclusions of the experts utilized by the agency.

Appendix B

The FAHA, the ISTEA, and FHWA and Federal Transit Administration ("FTA") regulations require that federal transportation agencies (the FHWA and the FTA), the MPO (the DVRPC) and state transportation agencies comply with an intricate program for transportation planning. That program requires long-term planning (20 years), which includes development of a Transportation Plan ("Plan"), and short-term planning (3 years) on both a metropolitan and a statewide geographic scale, known respectively as a Transportation Improvement Program ("TIP") and a State Transportation Improvement Program ("STIP"). *See* 23 U.S.C. §§ 134, 135.

Because the region at issue here — the Philadelphia metropolitan area — contains a population greater than 200,000 persons, the area must both include a Metropolitan Planning organization ("MPO") — the DVRPC — and be designated as a Transportation Management Area ("TMA"). Designation as a TMA means that a CMS must be prepared. Where, as here, the TMA is in a nonattainment area for ozone or carbon monoxide, the CMS must include consideration of reasonably available strategies to reduce travel demand prior to adding single occupant vehicle ("SOV") capacity to the transportation network. *See* 23 C.F.R. §§ 450.336(b)(1) & (2), 500.109(d)(1) & (2).

Because Section 700 is a highway improvement of substantial cost which is expected to have a significant effect on factors such as capacity, traffic flow and level of service, and which was initiated but not completed when the MIS regulations were issued on October 28, 1993, a MIS is necessary and both the FHWA and the FTA must be consulted to determine the precise MIS requirements to be applied to the project. *See* 23 C.F.R. §§ 450.104, 450.318.

Appendix B

Defendants complied with these requirements by establishing for the relevant periods and the Section 700 project the necessary TIP, STIP, Plan, CMS and MIS. In accordance with the statutory and regulatory provisions, defendants and/or DVRPC considered as part of the Plan, the TIP and the STIP various factors defining the scope of the planning process;[11] developed a public involvement

11. The statewide and metropolitan transportation planning processes must provide for consideration of projects and strategies that will —

> increase the safety and security of the transportation system for motorized and nonmotorized users; increase the accessibility and mobility options available to people and for freight; protect and enhance the environment, promote energy conservation, and improve quality of life; enhance the integration and connectivity of the transportation system, across and between modes, for people and freight; promote efficient system management and operation; and emphasize the preservation of the existing transportation system.

23 U.S.C. §§ 134(f)(1), 135(c)(1). In addition, the metropolitan planning process must provide for consideration of projects that will "support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency," while the statewide planning process must provide for consideration of projects that will "support the economic vitality of the United States, the States, and metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency." *See* 23 U.S.C. §§ 134(f)(1)(A), 135(c)(1)(A).

In any event, a failure of the responsible agencies to consider any of these factors is not reviewable by the court. *See* 23 U.S.C. §§ 134(f)(2), 135(c)(2).

process as part of the Plan and the TIP which included publication of planning goals and various studies on population, employment growth, commuting patterns, workforce distribution and housing forecasts, *see* 23 U.S.C. § 134(g)(4), (h)(1)(B); investigated various strategies to reduce travel demand including traffic flow improvements, carpooling, non-motorized programs, flexible work hours and parking pricing controls; and, included Section 700 in the Plan, the TIP and the STIP.

As required by the CMS regulations, defendants and the DVRPC analyzed 36 travel demand reduction and operational management strategies; analyzed all 15 such strategies deemed reasonably available; determined that no one or combination of the CMS strategies would address the needs and purpose of Route 202; and, summarized the results in the DEIS and the FEIS.[12] The CMS identified an implementation schedule, the agencies responsible for the project and the funding sources as required.

Consistent with the MIS regulations, the DVRPC consulted the FHWA and the FTA and performed a MIS in conjunction with the other environmental analyses in the project study. The MIS included a definition of the purpose and need of the project, and consideration of numerous alternatives including: no action; congestion management strategies; transportation systems management; widening existing U.S. 202; widening existing U.S. 202 with Chalfont runaround; widening Upper State Road/Shady Retreat Road; relocating U.S. 202 on new alignment; widening Upper State

12. Defendants nevertheless committed to a carpool/vanpool program and traffic management program.

Road with new alignment connector; widening Stump Road with new alignment connectors; a relief corridor northwest of U.S. 202; new alignment southeast of Stump Road; and, mass transit. Following these analyses, the FHWA approved and recommended for detailed study and inclusion in the DEIS three build alternatives — widening Upper State Road/ Shady Retreat Road; relocating U.S. 202 on new alignment; and, widening Upper State Road with new alignment connector — as well as the no action alternative.

A MIS/CMS Committee, co-chaired by PennDOT and the DVRPC, was established. Its members included the FHWA, the FTA, the Southeastern Pennsylvania Transportation Agency ("SEPTA"), the Montgomery and Bucks County planning Commissions, the U.S. Army Corps of Engineers, the EPA, the Pennsylvania Department of Environmental Protection and various affected townships. The MIS reviewed the public involvement process — four public meetings, six project newsletters and more than 100 meetings with agencies and public officials — and considered 15 additional alternatives which were rejected because their combined impact would be only a 4% reduction in vehicle travel miles. The FHWA and the FTA concurred that the final MIS satisfied the requirements of the MIS regulations.

It appears from the Record that defendants in fact satisfied the MIS requirements and all pertinent requirements of the FAHA and the ISTEA.

Appendix B

2. NEPA

In Counts III, IV, VIII, X and XIII of the Amended Complaint, plaintiff claims that defendants violated NEPA by improperly excluding the Pools Corner project from the Section 700 study area; inadequately projecting population; improperly performing traffic analyses; failing to provide plaintiff with an adequate opportunity to comment on the Section 700 project; and, failing to consider alternatives. The court will address plaintiff's allegations and the portions of the Record relevant thereto insofar as they pertain to the evaluation of defendants' actions under the APA.

NEPA "is primarily a procedural statute" which was "designed to ensure that environmental concerns are integrated into the very process of agency decisionmaking," *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 274 (3d Cir. 1983), and to inform the public that a government agency properly considered environmental concerns in its decision making process. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Morris County*, 714 F.2d at 275 (citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 142-43 (1981)).[13] NEPA requires only that agencies take a "hard look" at environmental consequences before engaging in any major action. *See Society Hill Towers Owners' Ass'n*, 20 F. Supp. 2d at 865.

---

13. The United States Army Corps of Engineers, the United States Environmental Protection Agency and the Pennsylvania Department of Environmental Protection are cooperating agencies for the NEPA environmental process. *See* 23 C.F.R. § 771.111(d).

Appendix B

Plaintiff claims that defendants ignored NEPA requirements by segmenting Section 700 and Pools Corner to avoid consideration of the impact of the highway project on plaintiff. It is clear from the Record, however, that defendants' determination of the scope of the Section 700 project and definition of the relevant study area were proper.

In determining whether defendants properly determined the scope of the project and properly defined its study area, the court has considered whether the project has logical termini; whether the Section 700 and Pools Corner projects have independent utility; and, whether the Section 700 project restricts consideration of alternatives for reasonably foreseeable transportation improvements within plaintiff's borders. *See* 23 C.F.R. § 771.111(f)(1)-(3). The court has also considered whether the Section 700 project causes such a significant increase in traffic in Buckingham Township that the decision to approve that project would have been arbitrary, capricious or an abuse of discretion.

The termini are logical. The intersection of Routes 202 and 63 is just south of major commercial malls in a township confronting serious traffic problems. Route 611 is a major crossroad adjacent to Doylestown which is a major regional population center. Section 700 and the Pools Corner project each have independent utility as each satisfies transportation needs or corrects transportation problems without reference to any other transportation project. The Record shows that the Section 700 New Alignment Alternative promotes transportation system linkage and consistency in highway planning; will ameliorate anticipated congestion; improves the likelihood that the roadway will meet future traffic

demand, service demands (e.g., fire, police) and community development pressures; and, enhances safety. The Record demonstrates that the Pools Corner project would remedy congestion, address safety concerns and improve the roadway's capacity for handling anticipated growth pressures regardless of whether the Section 700 project is completed.[14] Section 700 does not restrict the consideration of alternatives for reasonably foreseeable transportation improvements within plaintiff's borders.

The Record supports defendants' contention that their traffic projections and analyses regarding Section 700 were appropriate. Defendants conducted a series of standard traffic analyses of the project area and of the areas north and south of that area, including Buckingham Township.[15] The FHWA

---

14. Studies show that with no action Pools Corner would totally fail by 2018.

15. Plaintiff necessarily attacks the traffic projections. It suggests that defendants used fictional lanes in these analyses. Defendants aver that plaintiff and its expert have misconstrued various planning documents and what they describe as suspicious is nothing more than a coding convention applied in those documents. Plaintiff faults defendants for failing to split zones, however, it appears that this was done only in a particular focused study and zones were split in other areas. Plaintiff complains of "lost trips" which defendants aver represent driveway usage which is never picked up. In any event, these are insubstantial. Plaintiff points to an impedance number of 5.1 to suggest that traffic would be substantial enough to reduce speed at peak times to 5.1 m.p.h. Speed, however, is not an output of the Transplan program. Rather, various numbers which do not reflect true highway speed are inputted to perform an array of theoretical

(Cont'd)

considered the report of a consultant who conducted studies independent of the DVRPC using alternative computer analyses, a standard Highway Capacity Model and CORSIM program. The expert verified that Section 700 would not cause intolerable congestion north of the project area. Plaintiff has shown nothing more about population than a disagreement with projections reasonably derived from Census Bureau estimates utilizing basic demographic data. Defendants analyzed traffic by utilizing standard accepted methods with persons of substantial expertise who have provided sound explanations of what was done and why.

(Cont'd)

calculations. Plaintiff suggests that defendants did not set up a proper model and used constant proportions rather than allowing the computer to generate variables to improve statistical reliability. Defendants aver that this is simply untrue and that they ran 15 iterations to maximize reliability. Their conclusion was confirmed by additional analyses. Defendants forcefully refute plaintiff's claimed inability to replicate Supplement No. 4. They stress that if the program utilized is properly set up and run with the same numbers by an operator who correctly reads the numbers, the result must be the same. They convincingly point to notations of the expert engaged by plaintiff which suggest he did not understand or miscalculated some of the key numbers. Plaintiff pounces upon the adjustment by defendants' expert of many of the traffic numbers from the computer projections. Buttressed by their expert's detailed affidavit, defendants convincingly and logically explain that a computer program is simply a tool and that it would be irresponsible to disregard other pertinent data in making final projections. Seventeen of twenty-six numbers or nodes were adjusted by 15% or less, within the normal range of error. Moreover, most of these were adjusted upward based, *inter alia*, on actual traffic counts. Other numbers were adjusted upward even more to account for the addition of data reflecting traffic from the Broad Street ramps.

It appears that completion of Section 700 may increase somewhat the traffic burden on Buckingham Township. Defendants may lawfully determine, however, that some of the traffic burden presently suffered within the Section 700 project area should be shifted.

The Record does not show that defendants' decision to pursue the Section 700 project would result in increased congestion in the region or social, economic or environmental impact of such a magnitude as to render the decision arbitrary, capricious or an abuse of discretion.

The Record also belies plaintiff's claim that defendants failed to provide it with an adequate opportunity for involvement in the Section 700 project, as required by NEPA. The Record supports defendants' response that after preparing the DEIS and before preparing the FEIS, the FHWA requested comments on the DEIS, considered those comments and responded to those comments, as required by the NEPA regulations. *See* 40 C.F.R. §§ 1503.1, 1503.4. The FHWA also widely publicized, conducted public hearings regarding and requested comments on the FEIS, as required by its regulations. *See* 23 C.F.R. §§ 771.111(h), 771.123(h) & 771.125(g). The FHWA responded to all comments submitted, including those of plaintiff and its expert, Dr. Tomazinis. The FHWA distributed written materials regarding the project to the public and conducted meetings throughout the process with local elected officials, county planning commissions and other regional planning organizations, as well as Buckingham Township supervisors. FHWA officials met personally with representatives of plaintiff in Washington, D.C. at plaintiff's request. It is clear

from the Record that defendants complied with the NEPA mandate that the FHWA engage in discourse with the public prior to implementing Section 700.

Contrary to plaintiff's assertion, the Section 700 EIS is not deficient for failure to address all reasonable alternatives to the project approved by FHWA. NEPA's implementing regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) ("[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative"). *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 705 (3d Cir. 1999) ("NEPA requires the defendants to consider only 'reasonable' alternatives in the EIS"); *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) ("[t]he range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project").

As noted, as part of the CMS and MIS review processes, defendants considered in detail three build alternatives and a no action alternative. The alternatives deemed unreasonable and thus considered in less detail include: a Transportation Systems Management alternative which involved intersection improvements such as traffic signals and turn lane additions to increase capacity and efficiency, which defendants properly found unreasonable given the projected lack of improvement

or even degeneration of traffic congestion under the alternative; the CMS alternatives including regional rail improvements, park and carpool support programs and installation of bicycle racks at rail stations, all of which defendants properly found unreasonable as stand alone alternatives given their 4% reduction in travel demand; and, a Mass Transit alternative which defendants properly found unreasonable given that it would accommodate only 4% of the traffic anticipated in a No Action alternative.[16] It appears from the Record that defendants satisfied the NEPA alternative analysis requirement.

Plaintiff also suggests that defendants should have prepared a supplemental EIS in response to certain information provided to them by plaintiff. The information provided by plaintiff, however, was merely data which

---

16. Plaintiff suggests that defendants should have considered the abandoned R-2 line as an alternative. Defendants, however, did consider the R-5 line which was the best of the rail options and found it was a bare improvement over no action. Plaintiff also faults defendants for not considering as a reasonable alternative an arterial roadway as proposed by DVRPC in a memorandum of February 3, 1989. As indicated in the memorandum, this early option was recommended largely for reasons of expense. Moreover, except for the grading of intersections, this option is substantially the same as the new alignment with less impact on already heavily congested Chalfont. Also, as discussed in the DEIS and the FEIS, an arterial roadway would not reduce traffic on Route 202 and parallel roads as much as the approved project. Interestingly, even in its early memorandum, DVRPC recommended that any arterial roadway be constructed in a manner which would permit a future upgrade to a freeway north of Bethlehem Pike which includes the Chalfont and Doylestown areas.

defendants considered in Supplement No. 4. The Record shows that defendants reviewed the population data and arguments conveyed by plaintiff, conducted supplemental analyses based on that information and determined that the decision to pursue the Section 700 remained correct. The Record supports defendants' contention that a supplemental EIS is not required.

3. Clean Air Act

In counts VI and VII, plaintiff claims that defendants failed to satisfy the conformity requirements of the CAA.[17]

The conformity analysis performed by the DVRPC as MPO for the project appears in three TIPs and the Plan which were approved by the FHWA and the FTA. The DVRPC also completed a supplemental analysis which was submitted for public comment and received none. The conformity analysis showed that the TIP and the Plan for the Section 700 project would result in lower emissions of certain ozone precursors. After reviewing the analysis, the EPA concurred with that finding. In a letter confirming its view that the project would not harm the environment, the EPA commended PennDOT and the FHWA for their attention to environmental factors. The DEIS for Section 700 and the Pools Corner project analysis indicated that the carbon monoxide levels would be less than standard and thus acceptable. It appears from the Record that defendants satisfied the pertinent requirements of the CAA.

---

17. To the extent that plaintiff raises a challenge to the 1997 conformity rules, defendants are correct that such a claim may not be maintained here. *See* 42 U.S.C. § 7607(b)(1).

Appendix B

B. National Historic Preservation Act Claim

Plaintiff's direct claim under the NHPA is based on defendants' alleged failure to assess the effects of Section 700 on historic properties outside the study area, i.e., in Buckingham Township.[18] The Record establishes that, to the contrary, defendants fulfilled their responsibilities under the NHPA as to Section 700 and the Pools Corner project.

The NHPA "is primarily a procedural statute, designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for those properties." *Society Hill Towers Owners' Ass'n*, 20 F. Supp. 2d at 863 (quoting *Morris County*, 714 F.2d at 278-79). So long as the effect on

---

18. The statute provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

the properties is considered, the agency consults the Advisory Council on Historic Preservation ("ACHP") and the agency integrates the ACHP recommendations into the decision making process, the regulations are satisfied. *See* 36 C.F.R. § 60.2 (establishing consultation requirement and noting that "[h]aving complied with this procedural requirement the Federal agency may adopt any course of action it believes is appropriate"); *Concerned Citizens Alliance*, 176 F.3d at 695-96 (noting § 106 is a "stop, look and listen" provision that merely requires an agency to acquire information before acting).

The Record shows that defendants identified historic resources within the Section 700 project area and published those identifications. Defendants then worked with the Pennsylvania Historical and Museum Commission ("PHMC") and the ACHP to determine which properties would be eligible for the National Register. Defendants continued to cooperate with the PHMC until the PHMC concurred with defendants' findings regarding the effects of the project on historic resources and both the PHMC and the ACHP signed a Memorandum of Agreement for the project.

Defendants likewise conducted studies required by the NHPA for the Pools Corner project. Defendants secured an archaeological study of the area and completed a search for nearby historic structures. The PHMC concurred with defendants' determination that the Pools Corner project would have no effect on historic resources.

The steps taken by defendants constitute compliance with the procedural requirements of the NHPA. *See* 16 U.S.C. § 470f; 36 C.F.R. §§ 60.2, 800.4.

Appendix B

V. *Conclusion*

Increased development is an inevitable fact of life in expanding suburban areas. It is not unusual for residents who hoped indefinitely to maintain pristine surroundings forebodingly to bemoan such development and, if aroused, to do so tenaciously. At the same time, government is expected to plan for and accommodate population growth, commercial expansion and transportation needs. It is ultimately the responsibility of the officials with appropriate experience and expertise to weigh competing interests and make the often controversial decisions about how this is best achieved, subject to a narrow standard of judicial review. As noted, the "court is not empowered to substitute its judgment for that of the [responsible] agency." *Overton Park*, 401 U.S. at 416.

Plaintiff's opposition to the project at issue has been rancorous and relentless. Plaintiff accuses defendants of violating virtually every applicable statutory requirement. In a never ending cycle, refutation by defendants is followed by a "supplemental" submission with further accusations. The rhetoric has been acerbic. Tangential documents not included in the formal Record were "suppressed." Rational adjustments reflecting new population projections or other data demonstrate "falsification." Information allegedly "hidden" is in fact contained in the administrative record. A disputed traffic projection is not inaccurate but "fraudulent." Portions of documents are characterized as sinister which when read in context are innocuous.

Appendix B

Plaintiff posits treachery of a type that would require a massive conspiracy among federal and state officials. Plaintiff has not, however, actually demonstrated bad faith or impropriety. When asked why these officials would engage in such nefarious conduct, plaintiff's counsel could only speculate that perhaps they had become "wedded" to the project. There is no explanation, however, of why defendants would wed themselves to a project they knew to be deficient despite superior alternatives.

Even plaintiff acknowledges that some form of project is necessary to address serious traffic issues in the area. Plaintiff conceded at oral argument that upon further study, everyone "may well come back with something similar to what we have" and hypothesizes a Doylestown to New Hope expressway. This may eventuate. Most highway construction, however, is necessarily undertaken in logical phases.

It appears from a review of the administrative record at the time of decision that defendants complied with applicable law and that the decision was based on consideration of the relevant factors. The administrative determinations and decision were in accordance with law and were not arbitrary or capricious. There was no abuse of discretion or clear error of judgment. In these circumstances, the court is constrained to defer.

Accordingly, defendants' motion will be granted. An appropriate order will be entered.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 25, 2000 AND ENTERED FEBRUARY 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 99-621

BUCKINGHAM TOWNSHIP

v.

HON. KEN WYKLE, ADMINISTRATOR,
FEDERAL HIGHWAY ADMINISTRATION,

DAVID LAWTON, CHIEF OF PLANNING,
REGION 3, FEDERAL HIGHWAY ADMINISTRATION,

DELAWARE VALLEY REGIONAL
PLANNING COMMISSION, and

BRADLEY L. MALLORY, SECRETARY FOR THE
DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF PENNSYLVANIA

ORDER

AND NOW, this 25th day of February, 2000, upon consideration of intervening defendant Mallory's Motion for Partial Judgment on the Pleadings (Docs. #27) and

plaintiff's response thereto, because although at the time defendant Mallory intervened the original complaint in fact set forth a state law claim that the Delaware Valley Regional Planning Commission had violated 73 P.S. § 701 which he appears inadvertently to have overlooked, PennDOT is a state agency for the purpose of Eleventh Amendment immunity, *see Halstead v. Motorcycle Safety Found., Inc.*, 71 F. Supp. 2d 464, 470 n.3 (E.D. Pa. 1999); *Fitzpatrick v. Pennsylvania Dep't. of Transp.*, 40 F. Supp. 2d 631, 635 (E.D. Pa. 1999); because neither Congress nor the Pennsylvania legislature has abrogated PennDOT's Eleventh Amendment immunity as to the pertinent state law claims, *see* 1 Pa. Cons. Stat. § 2310; 42 Pa. Cons. Stat. §§ 8521 (b), 8522 (a) & (b); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 121 (1984); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999) (Eleventh Amendment precludes federal court from ordering state officials to conform their conduct to state law); *Blake v. Papadakos*, 953 F.2d 68, 73 n.5 (3d Cir. 1992) ("federal courts have no jurisdiction to review state officials' compliance with state law"); because although "a State's voluntary intervention in a federal court action to assert its own claim constitute[s] a waiver of the Eleventh Amendment," *Wisconsin Dep't. of Corrections v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (state asserting own monetary claim), Eleventh Amendment immunity is not waived as a matter of course upon intervention particularly where intervention is defensive, *see Missouri v. Fiske*, 290 U.S. 18, 25 (1933); *In re Secretary of Dept. of Crime Control*, 7 F.3d 1140, 1148 n.6 (4th Cir. 1993) (state intervention to contest court's jurisdiction to order payment of judgment did not constitute waiver of Eleventh Amendment immunity),

cert. denied, 511 U.S. 1109 (1994); *Neifeld v. Steinberg*, 438 F.2d 423, 431 n.17 (3d Cir. 1971) ("One who comes into court seeking relief against the plaintiff by cross-bill or counter claim and actively presses his claim thereby invokes the court's jurisdiction in the case so that he cannot thereafter question the authority of the court to pass upon all questions raised between himself and his adversary"); *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 414 (D.N.J. 1996), *aff'd*, 131 F.3d 353 (3d Cir. 1997); *United States v. Rohm & Haas Co.*, 939 F. Supp. 1157, 1162-63 (D.N.J. 1996) (defensive intervention of state in CERCLA action does not waive Eleventh Amendment immunity against counterclaims); *Radeschi v. Pennsylvania*, 846 F. Supp. 416, 421 (W.D. Pa. 1993) ("mere removal of a case by state officials does not, without much more, [such as pressing state's own affirmative [claims,] waive the Eleventh Amendment immunity unless those state officials are explicitly authorized to waive such immunity and clearly and unequivocally do so"); *United States v. Wheaton Industries*, 1991 WL 208877, at *1 (D.N.J. Oct. 8, 1991) (Eleventh Amendment immunity not waived where state's intervention is defensive response to claim against it); because defendant Mallory has not asserted affirmative rights but merely seeks defensively to protect the perceived interests of PennDOT insofar as they may be affected by the resolution of the pending federal claims; and, because Eleventh Amendment immunity may be raised at any time while a case is pending, see *Ford Motor Co. v. Dep't. of Treasury*, 323 U.S. 459, 467 (1945) ("[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this

case even though urged for the first time in this Court"); *Mitchell v. Commission on Adult Entertainment Establishments*, 12 F.3d 406, 409 (3d Cir. 1993) ("[t]he [E]leventh [A]mendment is quasi-jurisdictional"); *College Savs. Bank*, 948 F. Supp. at 414 ("[t]he Eleventh Amendment defense sufficiently 'partakes of the nature of a jurisdictional bar so that it need not [even] be raised in the trial court' ") (quoting *Florida Dep't. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982)), IT IS HEREBY ORDERED that said Motion is GRANTED and accordingly plaintiff's state law claims against intervenor-defendant Mallory under the Pennsylvania Transportation Act, 71 Pa. Stat. §§ 510 *et seq.*; the State Highway law, 36 Pa. Stat. §§ 670-901; the Delaware Valley Urban Area Compact, 73 Pa. Stat. § 701; and, Section 27 of Article 1 of the Pennsylvania Constitution are DISMISSED.

BY THE COURT:

s/ C. Waldman
JAY C. WALDMAN, J.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2673

BUCKINGHAM TOWNSHIP,

Appellant,

v.

KEN WYKLE, HONORABLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; DELAWARE VALLEY REGIONAL PLANNING COMMISSION

BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Intervenor in District Court

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 99-cv-00621)
District Judge: Honorable Jay C. Waldman

Argued October 30, 2001

Before: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*.

SUR PETITION FOR REHEARING

Appendix D

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court

s/ [illegible]
Circuit Judge

Dated: MAR 22 2002

LML\cc: RJS
BG
AFG
JmH

No. 01-1869

Supreme Court U.S.
FILED
JUL 25 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BUCKINGHAM TOWNSHIP,

Petitioner,

v.

KEN WYKLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; Delaware Valley Regional Planning Commission; and BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES SHEEHAN
General Counsel
ANDREW S. GORDON*
Chief Counsel
ROBERT J. SHEA
Assistant Chief Counsel
JOHN M. HRUBOVCAK
Assistant Counsel-In-Charge
KENDA JO M. GARDNER
Assistant Counsel
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
P.O. Box 8212
Harrisburg, Pa 17105-8212
(717) 787-5299

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the circuit courts are consistently applying this Court's decisions regarding the public disclosure required under the National Environmental Policy Act.

2. Whether the circuit courts are consistently applying this Court's decisions regarding the court's consideration of extra record evidence.

3. Whether petitioner waived the Eleventh Amendment issue by failing to challenge the dismissal of the state law claims in the Third Circuit.

4. Whether the Eleventh Amendment immunity applies to the state law claims raised by petitioner in its amended complaint after the stated filed its motion to intervene.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CITATIONS	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE PUBLIC DISCLOSURE REQUIRED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT	6
II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE COURT'S CONSIDERATION OF EXTRA RECORD EVIDENCE	14
III. BY FAILING TO CHALLENGE THE DISMISSAL OF THE STATE LAW CLAIMS IN THE THIRD CIRCUIT, PETITIONER HAS WAIVED THE ELEVENTH AMENDMENT ISSUE	17
IV. THIS COURT HAS HELD THAT A STATE'S INTERVENTION DOES NOT CONSTITUTE A WAIVER OF ITS ELEVENTH AMENDMENT IMMUNITY WITH RESPECT TO CLAIMS ADDED AGAINST THE STATE AFTER THE STATE FILED ITS MOTION TO INTERVENE	19
CONCLUSION	22

TABLE OF CITATIONS

CASES Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 17, 18

Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988) 16

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983) 7, 8, 11

Camp v. Pitts, 411 U.S. 138 (1973) 14

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 8, 13, 14, 15, 16, 17

City of Bridgeton v. Federal Aviation Admin., 212 F.3d 448 (8th Cir. 2000), *cert. denied,* 531 U.S. 1111 (2001) 10

City of Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997) 10

County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 15

Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985), *cert. denied*, 521 U.S. 1119 (1997) 11

Duignan v. United States, 274 U.S. 195 (1927) 18

Ex parte New York, 256 U.S. 490 (1921) 20

Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n, 470 U.S. 729 (1985) 14

Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1045) 20

Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991) (*per curiam*), *cert. denied*, 522 U.S. 1108 (1992) 16

TABLE OF CITATIONS—Continued

	Page
Hickory Neighborhood Defense League v. Skinner, 893 F.2d 58 (4th Cir. 1990)	10
Husty v. United States, 282 U.S. 694 (1931)	18
Lapides v. Board of Regents of the Univ. Sys. of Georgia, 122 S. Ct. 1640 (2002)	21
Lawn v. United States, 355 U.S. 339 (1958)	18
Kleppe v. Sierra Club, 427 U.S. 390 (1976)	7
Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)	10, 11
Missouri v. Fiske, 290 U.S. 18 (1933)	19, 20
National Audobon Soc'y v. Hoffman, *132* F.3d 7 (2d Cir. 1997)	15, 16
Natural Resource Defense Counsel v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)	10
Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803 (8th Cir. 1998), *cert. denied*, 522 U.S. 1108 (1998)	17
Pennhurst State Sch. v. Halderman, 465 U.S. 89 (1984)	19, 20
Sierra Club v. Army Corps of Eng'rs, 772 F.2d 1043 (2d Cir. 1985)	15
Stryckers' Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980)(*per curiam*)	7
Town of Norfolk v. Army Corps of Eng'rs, 968 F.2d 1438 (1st Cir. 1992)	16
Township of Springfield v. Lewis, 702 F.2d 426 (3d Cir. 1983)	6, 15
United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993)	16
United States v. Williams, 504 U.S. 36 (1992)	17
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1973)	7, 13, 14

TABLE OF CITATIONS—Continued

	Page
Webb v. Gorsuch, 699 F.2d 157 (4th Cir. 1983)....	15
Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981).....	7
STATUTES	
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq*.....	2, 4
United States Department of Transportation Act of 1966, 23 U.S.C. § 138	13
FEDERAL REGULATIONS	
23 C.F.R. §771.117(d)	6
40 C.F.R. §1502.1	10
40 C.F.R. § 1502.14(a).....	13
40 C.F.R. § 1502.21	8
Supreme Court Rule 14 (1)(i)(i)	18

IN THE

Supreme Court of the United States

No. 01-1869

BUCKINGHAM TOWNSHIP,

Petitioner,

v.

KEN WYKLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; Delaware Valley Regional Planning Commission; and BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, Buckingham Township, challenges the Federal Highway Administration's (FHWA) approval of the "New Alignment Alternative" to relieve traffic congestion and improve capacity and safety on U.S. 202 in Southeastern Pennsylvania. Within Pennsylvania, U.S. 202 forms a 95 kilometer (59 mile) corridor around the Philadelphia

metropolitan area between the Delaware and New Jersey state lines. (C.A. App. 2-000019a.) [1]

To comply with the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321, *et. seq.* (NEPA), respondents [2] prepared a Draft Environmental Impact Statement (DEIS) (C.A. App. 2-002850-3494), a Final Environmental Impact Statement Evaluation (FEIS) (C.A. App. 2-000001-2843), and numerous other technical studies involving the project. The DEIS and FEIS were circulated to obtain public and agency comments. (C.A. App. 2-000554-566; 3-001725-1743; 3-001752-1770.)

Respondents studied a total of twelve project alternatives. Of the twelve alternatives, the No Action Alternative; the Widening Alternative; the New Alignment Alternative; and the Combination Alternative were studied in detail in the environmental impact statement. (C.A. App. 2-000268.) The remaining eight alternatives were dismissed from further consideration because they did not satisfy the project needs or had excessive environmental impacts.

Respondents published a notice of the availability of the DEIS and FEIS for review and comment by the public in the *Federal Register*, *The Philadelphia Inquirer*, *Intelligencer Record* [3], *The Montgomery County Observer*, *The Reporter*, and *The Time Herald*. The DEIS and FEIS were available for public review and inspection at several locations throughout the study area during regular business hours. In addition,

---

[1] Citations are to the Appendix in the Court of Appeals (C.A. App.), to the Appendix to the Petition (Pet. App.), and to the Petition (Pet.).

[2] Respondents are Ken Wykle, Administrator of FHWA, David Lawton, Chief of Planning, Region 3 of FHWA, Delaware Valley Regional Planning Commission, and Bradley Mallory, Secretary for the Pennsylvania Department of Transportation.

[3] Both the *Intelligencer Record* and *Philadelphia Inquirer* have wide circulation in Buckingham Township. (C.A. App. 2-000968a.)

respondents held a public hearing to provide an opportunity for local officials and the general public to state their concerns and opinions regarding the DEIS. (C.A. App. 2-003499a, 2-000558a-559a.) Approximately 113 people provided testimony at the public hearing, and over 6,000 comments were received on the DEIS alone. Respondents considered and responded to each of the substantive comments received on the DEIS and FEIS. Moreover, respondents considered all substantive comments received up to the issuance of the Record of Decision (ROD). (C.A. App. 2-003510a.)

Respondents even conducted additional studies to address some of the comments received on the DEIS. Specifically, at the request of FHWA and PennDOT, Delaware Valley Regional Planning Commission (DVRPC)[4] prepared Supplement 4 to the Section 700 Traffic Analysis to respond to comments made by petitioner on traffic and population issues.[5] (C.A. App. 2-003812-3935.) The results of Supplement 4 were summarized in the FEIS. (C.A. App. 2-000512a-534a.)

Representatives for petitioner actively participated in the public involvement process for the project. Petitioner attended and provided oral testimony at the public hearing held on September 12, 1996, for the DEIS. (C.A. App. 2-001124-1129.) Moreover, respondents met with petitioner on September 19, 1996, to discuss its concerns with the project. (C.A. App. 2-000561.) Petitioner also submitted thirty-four

---

[4] The DVRPC is the designated metropolitan planning organization (MPO) for Southeastern Pennsylvania pursuant to 23 U.S.C § 134.

[5] Petitioner erroneously claims that Supplement 4 was not provided to them until after the FEIS was circulated. (Pet. 5.) Respondents made available to petitioner a copy of draft Supplement 4 on August 20, 1997, and final on October 10, 1997. (C.A. App. 3-001872-73; 3-001884.) The FEIS was not approved for circulation until October 16, 1997. (C.A. App. 2-000002a.)

pages of written comments on the DEIS (with seventy-eight pages of attachments) which were dated October 11, 1996. (C.A. App. 2-000911a.) On January 9, 1997, respondents met with Bucks County and several townships (including petitioner) to present the results of the additional traffic studies. (C.A. App. 3-000722.) On January 30, 1998, petitioner submitted comments on the FEIS and Supplement 4. (C.A. App. 3-000722.) Petitioner's comments consisted of a four volume set of documents - Volume IV of which is the Tomazinas Study which commented on the results of Supplement 4. Respondents considered and responded to the comments provided by petitioner at the public hearing and its written comments on the DEIS, FEIS, and Supplement 4. (C.A. App. 2-001126-1129; 2-000968-991; 3-000663-690.)

Petitioner also requested and was afforded a meeting with FHWA officials on February 27, 1998, at its Washington D.C. Headquarters; at which it presented its objections to the project, and resubmitted its comments. (C.A. App. 3-001922-1923.) FHWA officials in Washington D.C. reviewed the comments from petitioner and the FEIS and concluded that the FEIS addressed petitioner's concerns. (C.A. App. 4-135-137.)

FHWA weighed the resulting benefits and impacts from the alternatives studied in detail and selected the New Alignment Alternative. On August 27, 1998, FHWA signed the ROD. (C.A. App. 2-003496-3533.) The ROD completed the NEPA process.

Petitioner filed a complaint in the United States District Court for the Eastern District of Pennsylvania (district court) against FHWA alleging violations of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, NEPA, the National Historic Preservation Act, 16 U.S.C. §§ 470f&470-2(f), the Clean Air Act, 42 U.S.C. § 7506; and the Federal Aid Highway Act, 23 U.S.C. §§ 109(a)(2)&(h), 134, 135. Secretary Mallory filed a motion to intervene which was

granted by the district court. In response, petitioner requested leave to amend its complaint to include several state law claims against Secretary Mallory. Secretary Mallory moved for partial judgment on the pleadings requesting the dismissal of the state law claims based on Eleventh Amendment immunity. The district court granted Secretary Mallory's motion and dismissed the state law claims on February 25, 2000.

All parties moved for summary judgment on all of the federal claims. On June 22, 2001, upon consideration of numerous briefs that were filed with the court, the twenty-two box administrative record, and oral argument, the district court entered a memorandum and order granting respondents' motion for summary judgment and denying petitioner's motion. The district court specifically found that respondents had not acted in bad faith; that the traffic analysis and the alternative analysis contained in the DEIS and FEIS was adequate; and additional extra-record evidence was not appropriate. (Pet. App. 18a-19a, n. 10; 26a-27a, n. 15; 30a, n. 16; 35a.)

Petitioner appealed the June 22, 2001, judgment to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed stating: "The District Court wrote an excellent opinion that thoroughly addressed each of the numerous issues raised by Buckingham Township in its lengthy brief. We have nothing to add to that Court's fine opinion, and thus affirm." (Pet. App. 2a.)

REASONS FOR DENYING THE WRIT

This Court should deny the writ because the Court of Appeals' decision affirming the district court is unremarkable, and clearly correct. There is no issue of import sufficient to warrant review by this Court, nor is there a split in the circuit courts, only the petitioner's disagreement with the lower courts' interpretation of the record.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE PUBLIC DISCLOSURE REQUIRED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

Petitioner claims that the Third Circuit allowed the FHWA to evade compliance with NEPA by failing to place into the record information which it possessed or had in its control. [6] (Pet. 11.) Specifically, petitioner claims that the DEIS and FEIS failed to fully disclose the environmental consequences of the project because (1) the traffic analysis was based on model outputs that were adjusted by the experts running the model and on the existence of alleged fictional lanes within the model; and (2) the impacts of the Pools Corner intersection project were not included in the FEIS for the Section 700 project. [7] (Pet. 12-13.) Petitioner also claims that the DEIS and FEIS failed to contain a complete

---

[6] Petitioner mischaracterizes the Third Circuit's decision in *Township of Springfield v. Lewis*, 702 F.2d 426, 442 (3d Cir. 1983). (Pet. 11.) Petitioner claims that the Third Circuit permitted an agency to rectify the failure to properly address an alternative with an extra record affidavit submitted by the agency, which violated NEPA's disclosure requirements. However, the Third Circuit based its review of the alternatives on the FEIS and extra record expert affidavits presented by appellants, not the agency. *Id.* at 442.

[7] The traffic impacts at Pools Corner (the intersection of Routes 313, East State Street, and existing US 202) were disclosed in the FEIS for the Section 700 project. (C.A. App. 2-000526a.) No significant environmental impacts were found. (C.A. App. 2-003668 to 2-2003811.) Petitioner's attorney sent comments on the Pools Corner project and a presentation was made to petitioner's Supervisors. (C.A. App. 3-001982-1984, 3-003727.) Following a review of the environmental studies for Pools Corner and the comments received, FHWA determined that the Pools Corner project qualified as a Categorical Exclusion pursuant to FHWA regulations, 23 C.F.R. § 771.117(d). The improvements contemplated by the Pools Corner Project were needed regardless of whether or not the Section 700 project is ever built. Therefore, the Pools Corner project is an independent project with independent utility. (C.A. App. 2-00527a-528a.)

discussion of alternatives because the "controlled arterial alternative" was excluded from the alternative analysis. (Pet. 12-13.) The district court adequately addressed these factual issues and it is clear that decision here is consistent with well-settled law.[8]

NEPA has two fundamental purposes. First, NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1973), *see also*, *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). Second, NEPA ensures that the public will be informed of the potential environmental impacts considered by the agency in its decision-making process. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981); *Baltimore* 462 U.S. at 97. Under NEPA, agencies are not required to elevate environmental concerns over other considerations. *Baltimore Gas*, 462 U.S. at 97; *Stryckers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)(*per curiam*). NEPA only requires that the agency take a "hard look" at the environmental impacts of the project during its decision-making process. *Baltimore Gas*, 462 U.S. at 97; *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). In reviewing an agency decision under NEPA, "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas*,

---

[8] Petitioner contends that the district court found this project to be "good", "necessary", and "reasonable" and then excused compliance with NEPA. To the contrary, the district court carefully analyzed the record and voluminous briefs filed with respect to this project and found that the procedural process mandated by NEPA was fully followed. (Pet. App. 24a-31a.)

462 U.S. at 97-98, *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-417 (1971).

This Court has addressed the issue of disclosure required by NEPA in *Baltimore Gas*, 462 U.S. at 98-101. In *Baltimore Gas*, the Court reviewed the Nuclear Regulatory Commission's Statement of Consideration announcing the final Table S-3 which evaluated the environmental effects of the nuclear fuel cycle for nuclear power plants. *Id.* at 99. The issue was whether the Commission properly disclosed the uncertainties considered by the Commission regarding the nuclear fuel cycle in accordance with NEPA. The Statement summarized "the major uncertainty of long-term storage in bedded-salt repositories, which is that water could infiltrate the repository as a result of such diverse factors as geologic faulting, a meteor strike, or accidental or deliberate intrusion by man." *Id.* Table S-3 also referenced studies that discussed the uncertainties in greater detail. *Id.* Citing Council on Environmental Quality regulations, 40 C.F.R. §1502.21, this Court found it proper to incorporate other studies by reference. *Id.* at 99, n. 12. Based on the record and the Commission's statement, this Court found that the Commission adequately disclosed the uncertainties considered. *Id.* at 99.

The present case in analogous to *Baltimore Gas*. The traffic impacts [9] and the controlled arterial alternative [10] were properly disclosed in the DEIS and the FEIS for the Section 700 project. DVRPC prepared an initial traffic study and four supplemental traffic studies for respondents. The initial traffic study evaluated six alternatives including the "controlled arterial alternative". (C.A. App. 3-000091-229.)

---

[9] The district court addressed this issue in its June 22, 2001 decision and the Third Circuit affirmed. (Pet. App. 26a, n. 15.)

[10] The district court addressed this issue in its June 22, 2001 decision and the Third Circuit affirmed. (Pet. App. 30a, n. 16.)

Supplement 1 added the widening alternative and included traffic projections for additional roads, including U.S. 202 in Buckingham Township. (C.A. App. 3-000230-270.) Supplement 2 also included the traffic projections in Buckingham Township. (C.A. App. 3-000271-284.) Supplement 3 included an additional alternative (limited access, also referred to as the new alignment or expressway) and traffic projections in Buckingham Township. (C.A. App. 3-000330-373.) The traffic analysis revealed that the expressway, as contrasted with the "controlled arterial alternative", offered more relief to the local roadways, the purpose of Section 700, and more effectively satisfied the needs. (C.A. App. 3-000430.) Finally, at the request of respondents, DVRPC prepared Supplement 4 (C.A. App. 2-003812-3935) to respond to comments made by petitioner on traffic and population issues. (C.A. App. 2-000522.) Supplement 4 also detailed traffic projections in Buckingham Township.

The DEIS summarized and referenced the initial traffic study and Supplements 1 through 3. (C.A. App. 2-002865a.) The FEIS summarized and referenced the results of Supplement 4, as well as the previous traffic studies. (C.A. App. 2-000017a; 2-000533-530.) Both the DEIS and the FEIS contain two sections summarizing the traffic analysis which discussed the existing traffic, traffic projections for the year 2018, and the traffic projections associated with each of the alternatives. (C.A. App. 2-003008a-3015a; 2-003267a-3278a; 2-000177a-184a; 2-00512a-534a.) It is clear, therefore, that by any reasonable measure the traffic analysis was adequately disclosed under NEPA.

Petitioner suggests that there is a conflict among the circuits regarding NEPA's disclosure requirements. Petitioner seems to suggest that other courts of appeals required the disclosure of *all* facts and analyses. (Pet. 10.)

But to the contrary, even the cases relied upon by petitioner undercut its position.

Per Council on Environmental Quality regulations, an environmental impact statement (EIS) is a summary document.

> Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency made the necessary environmental analyses.

40 C.F.R. §1502.1. The content of an EIS is governed by the "rule of reason". *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989). Petitioner cites a number of circuit court decisions in support of his notion that NEPA requires the explication of all facts. (Pet. 10.) However, these cases apply the "rule of reason" and have found that not all facts need to be disclosed in the EIS. *City of Bridgeton v. Federal Aviation Admin.*, 212 F.3d 448, 459 (8th Cir. 2000)(held NEPA was complied with because ROD briefly explained why several alternatives were eliminated from detailed study); *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1151, 1162-63 (9th Cir. 1997)(held that FEIS adequately disclosed (1) wetland impacts even though effected wetlands may have been expanded by earthquake; and (2) growth inducing impacts from a new highway because the development was planned for in the Carmel Valley Master Plan which was accounted for and analyzed in the FEIS); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 62-63 (4th Cir. 1990) (held supplemental EIS was not required when the Claremont Historic District was listed on the National Register of Historic Places); *Natural Resource Defense Counsel v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)(held that the agencies' coverage of conservation policies served NEPA's informational purposes even though the FEIS dealt with the

matter in general terms and did not provide appellants with detailed responses to their comments); *Druid Hills Civic Assoc. v. Federal Highway Admin.*, 772 F.2d 700, 710-12 (11th Cir. 1985)(considered appellants claims that various facts were not disclosed regarding safety data and level of service for three intersections and held discussion in EIS was adequate).

It is well settled that "an agency must have the discretion to rely on the reasonable opinions of its own qualified experts . . . ." *Marsh*, 490 U.S. at 377-78. In reviewing an EIS, the district court should give latitude to the agency to rely on its own experts. *Id.*; *Baltimore Gas*, 462 U.S. at 103. Based on these rulings, the FHWA is entitled to rely on its experts; therefore, the assumptions and computer set-ups, which were subordinate to the conclusions or opinions of those experts, do not have to be in the administrative record. Furthermore, FHWA in this case carefully reviewed the traffic information as to its reasonableness and even double-checked DVRPC's results by having another consultant conduct additional traffic studies using CORSIM and the Highway Capacity Manual. (C.A. App. 3-000720-725.)

Petitioner protests, nevertheless, that several items were not discussed in the EIS, and therefore, were not properly disclosed under NEPA. (Pet. 12-13.) These items include: impacts to Buckingham Township; the "controlled arterial alternative"; adjustments made by the traffic experts to the traffic model output; and fictional lanes used in the traffic model. The issues that petitioner has with this project boil down to the adequacy of the traffic analyses. Upon reviewing the administrative record and numerous affidavits filed by both sides on traffic issues, the district court addressed each of these factual issues. The district court found that respondents conducted a series of standard traffic analyses of the area which included Buckingham Township. (Pet. App. 26a.) The district court found that respondents conducted

additional traffic studies independent of DVRPC using an alternative computer analysis which verified that Section 700 would not cause intolerable congestion north of the project area. (Pet. App. 27a.) The district court found that respondents properly analyzed the traffic by using "standard accepted methods with persons of substantial expertise who have provided sound explanations of what was done and why." (Pet. App. 27a.) The district court addressed the adjustments to the traffic numbers made by respondent's experts, finding that adjustments to the model is standard practice when conducting traffic projections.[11] (Pet. App. 27a, n. 15.) Finally, the district court addressed petitioner's erroneous fictional lane allegations, concluding that petitioner has misconstrued various planning documents and the coding convention used in those documents.[12] (Pet. App. 26a, n. 15.)

---

[11] Following the computer simulation for Supplement 4, DVRPC staff reviewed the output from the computer based on: comparison with actual traffic counts; current traffic counts; traffic growth trends implicit from comparisons between the original (1991); current traffic counts; traffic flow theory; and available detailed traffic studies. Where necessary, appropriate corrections were made. Simulated traffic volumes were adjusted and corrected in accordance with accepted transportation practice to produce as accurate and representative forecasts as possible. (C.A. App. 003691-3693.) DVRPC explained the traffic volume adjustments made by DVRPC for the 29 links. (C.A. App. 003693-3701.) Most of the adjustments increased, rather than decreased, the traffic volumes over the volumes from the TRANPLAN computer output. (C.A. App. 004843-4844.)

[12] Several coding conventions can be used for the computer traffic model. The lane coding method DVRPC used for the Section 700 traffic forecasts was to code the number of intersection approach lanes (C.A. App. 004856, 004864, 004871, 004878, 005638, 005684, 005792, 005789-5793, 3-000999), and not the number of through lanes in the middle of the link, for signalized suburban and rural arterials in some sections of the U.S. 202 corridor. By using this method of lane coding, if an intersection has a turning lane, an additional lane will show up mid-block that does not exist, i.e., petitioner's alleged fictional lanes. In addition, Bogart Tavern Road was coded as handling thru traffic when it

Finally, petitioner complains that the "controlled arterial alternative" disappeared during the project development process and was excluded from the EIS. (Pet. 5, 12.) NEPA's implementing regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). *See also Vermont Yankee*; 435 U.S. at 551. The "controlled arterial alternative" was one of the initial alternatives studied; traffic projections were made; an expressway alternative was developed which more fully satisfied the project needs and avoided taking five historic resources in the Chalfont Historic District; [13] a public meeting was held to discuss the change; and the discussion was included in the alternative section of the DEIS and FEIS. (C.A. App. 3-000806, 3-000802-809; 2-000236; 2-003066; 000430-435.) Clearly, the "controlled arterial alternative" was properly studied and disclosed under NEPA.

Under any test, the disclosure here was adequate. The lower courts properly addressed the claim contested with the well-settled law of this Court and the other courts of appeals.

---

was actually a dead end. This was analyzed and determined to be an insignificant impact, limited to only a few hundred feet of roadway. As summarized in affidavits, the results of this analysis verified the results of the traffic analysis using intersection coding. Petitioner had the opportunity to respond to this additional analysis.

[13] Section 4(f) of the U.S. Department of Transportation Act of 1966, unlike NEPA, is a substantive statute that requires FHWA to avoid the use of historic resources if there is a feasible or prudent alternative. 23 U.S.C. §138, *Overton Park*, 401 U.S. at 405. Therefore, the use of the historic resources in Chalfont was avoided.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE COURT'S CONSIDERATION OF EXTRA RECORD EVIDENCE.

Judicial review under the NEPA is based on a review of the administrative record that was before the decision-makers at the time the relevant determinations were made. *Overton Park*, 401 U.S. at 420. In *Camp v. Pitts*, 411 U.S. 138 (1973), this Court stated that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 U.S. at 142. The Court's decision in *Vermont Yankee*, 435 U.S. at 549, which involved a challenge under NEPA, followed *Overton Park* and *Pitts*. In *Vermont Yankee*, this Court summarized its prior rulings by stating: "We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review . . . .'" 435 U.S. at 549, *citing*, *Pitts*, 411 U.S. at 143.

In *Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 470 U.S. 729 (1985), the Court reiterated its holdings in *Overton Park* and *Pitts*. "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 743-44. Thus, in accordance with the standards laid out by this Court, a district court reviewing an agency decision acts like an appellate court—the court generally does not hear or take evidence beyond that which is contained in the administrative record.

This Court has recognized only two exceptions to the well-settled administrative record rule: (1) a district court may require some explanation if the bare record does not disclose the factors considered by the agency or the decision-maker's

construction of the evidence; and (2) additional evidence is permitted where there is a strong showing of bad faith or improper behavior. *Overton Park*, 401 U.S. at 420.

Petitioner claims that it was entitled to an evidentiary hearing because of its allegations of bad faith. (Pet. 16, 21-23.) Again, Petitioner argues that there is a split in the circuits regarding the circumstances under which it is proper to take new evidence. Petitioner claims that the Second, Fourth, and Ninth Circuits permit a broader range of extra-record evidence. [14] (Pet. 17.) To the contrary, those courts apply the same exceptions to the record rule described by this Court and utilized by the courts below in this case. Specifically, with regard to allegations of bad faith, those

---

[14] The case law cited by petitioner in support of its contention that there is a split in the circuits in the Second, Fourth, and Ninth Circuits' interpretation of the administrative record rule is not applicable to petitioner's argument. Petitioner argues that an evidentiary hearing is needed based on alleged bad faith conduct by respondents. The cases cited from the Second, Fourth, and Ninth Circuits do not involve issues of bad faith. *See County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977); *Sierra Club v. Army Corps of Eng'rs*, 772 F.2d 1043 (2d Cir. 1985); *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983).

Moreover, petitioner incorrectly claims that the Third Circuit flatly prohibits the receipt of any extra record evidence. Petitioner cites *County of Suffolk, 562 F.2d* at 1384-85; *Webb, 699 F.2d* at 159, n.2; and *National Audubon Society*, 132 F.3d at 15, for the proposition that extra-record testimony or affidavits may be considered when allegations are made that an EIS failed to mention an environmental impact or failed to discuss a reasonable alternative. (Pet. 14.) In the present case, the district court and the Third Circuit considered thirteen expert affidavits submitted by petitioner with regard to allegations of inadequate traffic studies and air quality analysis and five affidavits by petitioner's Supervisors (a total of 300 pages). In *Township of Springfield v. Lewis*, 702 F.2d 426, 440-41 (3d Cir. 1983), the Third Circuit also reviewed two expert affidavits submitted by appellants in determining the adequacy of a FEIS citing *County of Suffolk* as authority. In *Township of Springfield*, an evidentiary hearing was also held with regard to the issue of location approval. *Id.* at 434. Third Circuit precedent clearly is consistent with *County of Suffolk*.

circuits have held that, for this exception to the administrative record to apply, there must be "a strong showing of bad faith or improper behavior" citing *Overton Park*, 401 U.S. at 420 as authority. *National Audobon Soc'y v. Hoffman*, 132 F.3d 7, 16 (2d Cir. 1997); *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 460 (4th Cir. 1993); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

In *National Audobon Society*, 132 F.3d at 16, appellant claimed that the agency acted in bad faith by using the environmental assessment (EA) as a tool to justify decisions that the agency had already made. Appellants offered an affidavit from a former employee of the agency that stated that the agency had already decided to issue the Finding of No Significant Impact prior to completion of the EA. *Id.* The Second Circuit upheld the district court's decision not to include extra-record affidavits because appellant failed to make a strong showing of bad faith. *Id.*

Similar to petitioner's claims in the present case, in *Animal Defense Council*, 840 F.2d at 1438, appellant argued that limiting review of the NEPA issues to the administrative record and prohibiting discovery prevented it from gathering the facts necessary to make out its bad faith claims. Upon reviewing the administrative record, the Ninth Circuit held that appellant failed to show that the Bureau acted in bad faith and that discovery would not have helped appellant make that showing. *Id. See also Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991)(*per curiam*)(holding district court did not err by barring discovery when Tribe pointed to nothing in support of its allegations that the Chief of the Forest Service acted in bad faith).

Other circuits have followed the rule developed by *Overton Park* requiring a "strong showing of bad faith or improper behavior". In *Town of Norfolk v. Army Corps of Eng'rs*, 968 F.2d 1438, 1458-59 (1st Cir. 1992), the First Circuit found that appellants failed to make the requisite strong showing of

bad faith upon reviewing the administrative record where appellants alleged that "the Department of Justice and EPA secretly and improperly 'pressured' the Corps to issue the permit." In *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807-08 (8th Cir. 1998), appellants claimed that the administrative record should be supplemented with voluminous evidence concerning post-sale logging and road construction based on the bad faith exception because "of the discrepancy between the actual logging and road construction taking place, and the environmentally less damaging activity studied in the pre-sale Environmental Assessments." The Eighth Circuit held that this was not a strong showing of bad faith sufficient to justify looking outside the administrative record. *Id.* at 808.

In this case, the district court considered and rejected petitioner's bad faith claim. (Pet. App. 18a-19a, n. 10; 35a.) Although petitioner may quarrel with this conclusion, it is clear that the test applied in this case is consistent with the one followed in other circuits. There is no conflict.

Based on the above discussion, there is no split in the circuits regarding the bad faith exception to the administrative record rule established in *Overton Park*. The Third Circuit and other circuit courts are properly applying the rule set forth by this Court with regard to extra record evidence.

III. BY FAILING TO CHALLENGE THE DISMISSAL OF THE STATE LAW CLAIMS IN THE THIRD CIRCUIT, PETITIONER HAS WAIVED THE ELEVENTH AMENDMENT ISSUE.

This Court has consistently held that certiorari will not be granted on issues not pressed or passed upon in the court of appeals. *United States v. Williams*, 504 U.S. 36, 41 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970);

Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

The present case is analogous to *Adickes*, 398 U.S. at 148, n. 2. In *Adickes*, the district court denied petitioner's request to amend her complaint to include a third count under the Civil Rights Act of 1875. *Id.* Petitioner never raised any issue concerning the Civil Rights Act before the Second Circuit. This Court declined to consider the issue under the Civil Rights Act holding: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Id.*

In the present case, petitioner amended its complaint after Secretary Mallory filed a motion to intervene. Acting on a motion for judgment on the pleadings, the district court dismissed the state law claims based on the Eleventh Amendment by order dated May 25, 2000.[15] Petitioner filed an appeal with the Third Circuit to the district court's June 21, 2001, judgment which granted summary judgment in favor of respondents. The district court's June 21, 2001, decision never addressed the applicability of the state law claims or the Eleventh Amendment. Moreover, neither the notice of appeal, nor the briefs filed by petitioner in the Third Circuit raised the state law claims or addressed the application of the Eleventh Amendment to the dismissal of the state law claims.

Therefore, based on the above discussion, petitioner waived its rights to appeal the dismissal of the state law claims asserted in its amended complaint.

---

[15] Petitioner also failed to include the May 25, 2000 district court order in the Appendix as required by Supreme Court Rule 14 (1)(i)(i).

IV. THIS COURT HAS HELD THAT A STATE'S INTERVENTION DOES NOT CONSTITUTE A WAIVER OF ITS ELEVENTH AMENDMENT IMMUNITY WITH RESPECT TO CLAIMS ADDED AGAINST THE STATE AFTER THE STATE FILED ITS MOTION TO INTERVENE.

Irrespective of whether or not petitioner waived the Eleventh Amendment issue by not raising it before the court of appeals, Secretary Mallory did not waive the State's Eleventh Amendment immunity to the state law claims asserted in Federal Court. Under the Eleventh Amendment, a federal court may not award injunctive relief against officials on the basis of state law. *Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 91, 97 (1984). This Court has found:

> [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underline the Eleventh Amendment.

Id. at 106. Absent an unequivocal expression of the State's waiver of Eleventh Amendment immunity, a State may not be sued without its consent. *Id.* at 98-99.

In the present case, petitioner claims that Secretary Mallory has waived his right to assert Eleventh Amendment immunity because he intervened in this case. But, this Court has specifically held that intervention does not, in and of itself, amount to a waiver of Eleventh Amendment immunity. *Missouri v. Fiske*, 290 U.S. 18, 25 (1933). In *Missouri*, the State intervened in a case in federal court to protect its rights to inheritance tax. In response to the State's intervention, respondents brought an ancillary and supplemental bill of complaint to enjoin the State from prosecuting further in Probate Court. *Id.* at 25. In other words, the respondents there added a claim against the State after intervention. The

State requested the dismissal of the new claim asserting the Eleventh Amendment. Respondents claimed that the State waived its Eleventh Amendment immunity because it intervened in the litigation. *Id.*

First, this Court held that the State did not waive its Eleventh Amendment immunity, finding that the intervention was "limited in character." *Id.* The same result applies to the present case. The district court found: "[D]efendant Mallory has not asserted affirmative rights but merely seeks defensively to protect the perceived interests of PennDot insofar as they may be affected by the resolution of the pending federal claims . . . ." And none of the state law claims added in the amended complaint were in the case prior to intervention.

Second, this Court, in *Missouri*, 290 U.S. at 26-28, also reviewed the Eleventh Amendment issue under the following legal principle: "The entire judicial power granted by the Constitution does not embrace authority to entertain a *suit* brought by private parties against a State without consent given." *Id.* at 26, quoting *Ex parte New York*, 256 U.S. 490, 497 (1921) (emphasis added). This Court found respondents' bill of complaint to enjoin the State was unquestionably a "suit." *Id.* Therefore, this Court held:

> "[T]he State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent. . . ."

Id. at 27. Again, the same is true in the present case. Petitioner filed an amended complaint with state law claims against Secretary Mallory[16] after he filed his motion

---

[16] "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101, quoting, *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1045).

to intervene. Petitioner is attempting to subject the State of Pennsylvania to state claims without its "unequivocal" consent.

Petitioner argues that this Court should review the district court's decision in light of its recent decision in *Lapides v. Board of Regents of the Univ. Sys. of Georgia*, 122 S. Ct. 1640 (2002). In *Lapides*, a professor brought suit in state court against respondents, which included the state, alleging violations of state tort law. The defendants agreed to voluntarily remove the entire case to federal court. This Court found that in voluntarily agreeing to the removal of the case to federal court, the State waived its Eleventh Amendment immunity. It would be unfair to permit the state to invoke the federal court's jurisdiction and then to question it. Here, of course, the state defendant did no such thing. He never consented, directly or by implication, to federal jurisdiction on claims that were not present when he intervened.

Based on the above discussion, the district court properly applied the rule set forth by this Court. The State of Pennsylvania did not consent to the state law claims which were included in the amended complaint filed after its motion to intervene. Therefore, the Eleventh Amendment bars a suit against Secretary Mallory based on these state law claims in Federal Court.

CONCLUSION

For these reasons, respondent respectfully requests that the Court deny the writ of certiorari.

Respectfully submitted,

JAMES SHEEHAN
General Counsel
ANDREW S. GORDON*
Chief Counsel
ROBERT J. SHEA
Assistant Chief Counsel
JOHN M. HRUBOVCAK
Assistant Counsel-In-Charge
KENDA JO M. GARDNER
Assistant Counsel
PENNSYLVANIA DEPARTMENT
OF TRANSPORTATION
P.O. Box 8212
Harrisburg, Pa 17105-8212
(717) 787-5299

* Counsel of Record